Supreme Court, U.S.
FILED

No. 06-709 NOV 16 2006

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DARRELL GRAYSON,

Petitioner,

—v.—

TROY KING, Attorney General for the State of Alabama, in his official capacity; ROBERT E. OWENS, JR., District Attorney for Shelby County, in his official capacity; SHELBY COUNTY DISTRICT ATTORNEY'S OFFICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
COA DKT. NO. 05-15725p

PETITION FOR A WRIT OF CERTIORARI

PETER J. NEUFELD
VANESSA POTKIN
COLIN STARGER
INNOCENCE PROJECT
100 Fifth Avenue
New York, New York 10011
(212) 364-5340

DAVID BOIES
(Counsel of Record)
CHRISTOPHER M. GREEN
BRIAN T. KOHN
IAN M. DUMAIN
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
(914) 749-8200

Attorneys for Petitioner

CAPITAL CASE
QUESTION PRESENTED

Whether a death row inmate has a right of access under the due process clause of the Fourteenth Amendment to the potentially exculpatory biological evidence that was used against him at trial for the purpose of Short Tandem Repeat ("STR") DNA testing.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Darrell Grayson was the appellant below. The respondents in this Court, appellees below, are Troy King, Attorney General for the State of Alabama, in his official capacity; Robert E. Owens, Jr., District Attorney for Shelby County, in his official capacity; and the Shelby County District Attorney's Office (collectively, the "State").

William H. Pryor appeared as a defendant in the district court in his official capacity as Attorney General for the State of Alabama. Troy King was substituted for him at the commencement of the Eleventh Circuit appeal.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Introduction	2
B. Statement of Facts	4
C. The Proceedings Below	7
1. *The district court's opinion.*	8
2. *The court of appeals' opinion.*	9
REASONS FOR GRANTING THE WRIT	11
I. Absent this Court's Intervention to Protect Petitioner's Due Process Right of Access to the Potentially Exculpatory Biological Evidence That Was Used Against Him at Trial for the Purpose of STR DNA Testing, a Significant Risk Exists That an Innocent Man Will Be Executed	11

PAGE

a. The STR DNA Testing Mr. Grayson Seeks Could Definitively Prove Whether He Is Innocent of the Crimes for Which He Was Convicted. 12

b. Post-Conviction Exonerations Show that Exculpatory STR DNA Results Can Demonstrate Innocence Despite Apparently Overwhelming Evidence of Guilt. 15

1. Christopher Ochoa and Richard Danziger 16

2. Douglas Warney 17

3. Jeffrey Deskovic 18

II. The Existence of a Post-Conviction Right of Access to Potentially Exculpatory Biological Evidence for the Purpose of STR DNA Testing Is a Question of National Importance and the Decision of the Court Below Is Wrong and Contrary to this Court's Precedents 20

a. Under *Brady v. Maryland* and Its Progeny, There Exists a Limited Due Process Right of Access to Biological Evidence for the Purpose of STR DNA Testing. 22

PAGE

b. The Court of Appeals Incorrectly Applied this Court's *Mathews v. Eldridge* Balancing Test, as the *Mathews* Factors Weigh Heavily in Favor of the Right that Mr. Grayson Invokes. 27

CONCLUSION 30

APPENDIX

Court of Appeals Opinion..... 1a

District Court Order of Dismissal 28a

District Court Memorandum Opinion 30a

Magistrate Report and Recommendation..... 33a

42 U.S.C.A. § 1983..... 47a

Fourteenth Amendment to the United States Constitution 48a

People v. Warney, Ind. No. 88/96 (N.Y. Sup. Ct., May 16, 2006) Decision & Order..... 50a

People v. Warney, Ind. No. 88/96 (N.Y. Sup. Ct., NY, Dec. 15, 2004) Decision & Order..... 54a

TABLE OF AUTHORITIES

Cases: PAGE

Ake v. Oklahoma, 470 U.S. 68 (1985) 27, 28

Alley v. Key, 2006 WL 1313364 (6th Cir. 2006) .. 21, 22

Apprendi v. New Jersey, 530 U.S. 466 (2000) 14

Blakely v. Washington, 542 U.S. 296 (2004) 14

Bradley v. Pryor, 305 F.3d 1287 (11th Cir. 2002) 29

Brady v. Maryland, 383 U.S. 83 (1963) .....*passim*

Carey v. Piphus, 435 U.S. 247 (1978) 28

Fuentes v. Shevin, 407 U.S. 67 (1972) 28

Godschalk v. Montgomery County District Attorney, 177 F. Supp.2d 366 (E.D. Pa. 2001) .....*passim*

Grayson v. State, 479 So.2d 69 (Ala. Crim. App. 1984)..... 7

Grayson v. State, 675 So.2d 1516 (Ala. Crim. App. 1995)..... 7

Grayson v. Thomson, 257 F. 3d 1194 (11th Cir. 2001).....4, 7, 15

Harvey v. Horan, 2001 WL 419142 (E.D. Va. 2001) 25

Harvey v. Horan, 278 F.3d 370 (4th Cir. 2002) 21, 25

Harvey v. Horan, 285 F.3d 298 (4th Cir. 2002).....2, 20, 23, 25

PAGE

Herrera v. Collins, 506 U.S. 390 (1993) 27

House v. Bell, 126 S.Ct. 2064 (2006) 2, 12, 14

Imbler v. Pachtman, 424 U.S. 409 (1976)..... 24

In re Winship, 397 U.S. 358 (1970)..... 15

Mathews v. Eldridge, 424 U.S. 319.....*passim*

Ohio Adult Parole Authority v. Woodward, 523 U.S. 272 (1986)..... 27

Osborne v. District Attorney's Office for Third Judicial Dist., 445 F.Supp.2d 1079 (D. Alaska 2006) 9, 22, 26

Osborne v. State, 110 P.3d 986 (Alaska Ct. App. 2005)..... 23

Pennsylvania v. Ritchie, 480 U.S. 39 (1987)..... 24

Ring v. Arizona, 536 U.S. 584 (2002) 14

Smith v. Roberts, 115 F.3d 818 (10th Cir. 1997).. 23

Thomas v. Goldsmith, 979 F.2d 746 (9th Cir. 1992)..... 23

U.S. v. Bagley, 473 U.S. 667 (1985)..... 26

Wade v. Brady, 2006 WL 3051770 (D. Mass. 2006).....20, 23, 24, 25

Watkins v. Miller, 92 F.Supp.2d 824 (D. Ind. 2000)..... 13

Constitutional and Federal Statutes:

28 U.S.C. § 1254(1) 1

PAGE

Fourteenth Amendment to the U.S. Constitution ..... *passim*

Section 1983 of Title 42 of the U.S. Code ..... *passim*

Other Authorities:

Jonathan Bandler, *Wrongly Imprisoned, Deskovic is Formally Cleared in Slaying*, The Journal News, Nov. 2, 2006 19

Gary Craig, *Justice's 10-Year Detour Ends For Innocent Man*, Democrat and Chronicle, May 17, 2006 18

Robert Earle & Carl Bryan Case, Jr., *The Prosecutorial Mandate: See That Justice is Done*, 86 Judicature 69, 71-72 (September-October 2002) 17

Jonathan Peterson, *Funds for DNA Testing of Criminals are Diverted*, L.A. Times, Dec. 27, 2001 2

Maurice Possley & Steve Mills, *Crimes Go Unsolved as DNA Tool Ignored*, Chicago Tribune, October 26, 2003 3

Bill Rankin, *Rape Case Shifts to New Suspect*, Atlanta Journal and Constitution, Dec. 15, 2005 16

Michael Rubinkam, *DNA Evidence Frees Man Jailed Since '87 in Rape of 2 Women; Prosecutor to Seek Dismissal of Charges*, Pittsburgh Post-Gazette, Feb. 15, 2002 26

PAGE

Fernanda Santos, *DNA Testing Frees Man Imprisoned for Half His Life*, New York Times, Sept. 21, 2006 19

Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches From the Wrongly Convicted* xv (2000)..... 3

Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make It Right* 163-202 (2003) 4

Mark Wrolstad, *Hair-Matching Flawed as a Forensic Science: DNA Testing Results Reveals Dozens of Wrongful Verdicts*, Dallas Morning News, March 31, 2002 17

Jim Yardley, *Texas Inmate's Confession Slips Through the Cracks*, New York Times, Oct. 17, 2000 17

President George W. Bush, 2005 State of the Union Address, *available at* http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html..... 20

http://www.dna.gov/info/ 2

http://www.fbi.gov/hq/lab/codis/index1.htm 3

http://www.innocenceproject.org..... 2, 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner Darrell Grayson ("Grayson") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Hull, J.) is reported at 460 F.3d 1328. The opinion of the United States District Court for the Northern District of Alabama (Bowdre, J.) is not reported. The report and recommendation of the magistrate judge ("Rep. and Rec.") is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on August 18, 2006.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Section 1983 of Title 42 of the U.S. Code provides in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United

States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

STATEMENT OF THE CASE

A. Introduction

Since 1989, at least 187 individuals have been exonerated through the use of post-conviction DNA testing.[1] Thanks largely to these exonerations, it is now conventional wisdom that "DNA technology is increasingly vital to ensuring accuracy and fairness in the criminal justice system."[2] Indeed, former United States Attorney General John Ashcroft observed nearly five years ago that "DNA can operate as a kind of truth machine, ensuring justice by identifying the guilty and clearing the innocent."[3] And just last Term, in *House v. Bell*, 126 S.Ct. 2064 (2006), this Court recognized the critical role that forensic DNA testing can play in preventing miscarriages of justice.

The STR DNA testing that Mr. Grayson seeks represents a dramatic paradigm shift in forensic science. *See Harvey v. Horan*, 285 F.3d 298, 305 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) ("These scientific advances, which have rendered it literally possible to confirm guilt or innocence beyond any question whatsoever, at least in some categories of cases, are no ordinary developments, even for science."). This testing

---

[1] *See* http://www.innocenceproject.org (last visited November 13, 2006)

[2] http://www.dna.gov/info/ (last visited November 13, 2006).

[3] Jonathan Peterson, *Funds for DNA Testing of Criminals are Diverted*, L.A. Times, Dec. 27, 2001, at A22.

is able to generate DNA profiles—sometimes referred to as genetic fingerprints—that are almost unique. Indeed, the frequency of a particular STR DNA profile is on the order of one in several billion people.

STR DNA testing provides the foundation for the national and state DNA databases. Those databases are linked through the Federal Bureau of Investigation Laboratory's Combined DNA Index System ("CODIS"), which enables federal, state and local crime labs to exchange and compare DNA profiles. The CODIS database consists of a forensic index, which contains STR DNA profiles recovered from crime scene evidence; and an offender index, which contains STR DNA profiles of individuals convicted of sex crimes and other violent and non-violent felonies.[4] Through the use of offender databases like CODIS, STR DNA testing can not only exclude the falsely convicted, it can also lead to the apprehension of the true perpetrators of crimes. Indeed, in a study by the Chicago Tribune of 115 post-conviction DNA exonerations, there were fifty-one cases where new suspects were identified through the use of DNA databases.[5]

Over the past two decades, DNA testing has exposed deeply rooted, systemic problems with the criminal justice system, demonstrating with unprecedented certainty that more innocent people suffer in prison or await execution than most lay citizens and legal scholars imagine.[6] There are many causes of wrongful convictions, including false eyewitness identification; false confessions; careless or

---

[4] *See generally* http://www.fbi.gov/hq/lab/codis/index1.htm.

[5] *See* Maurice Possley & Steve Mills, *Crimes Go Unsolved as DNA Tool Ignored*, Chicago Tribune, October 26, 2003.

[6] DNA exonerations have "laid bare" the "fabric of false guilt." Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches From the Wrongly Convicted* xv (2000).

fraudulent forensic evidence; unreliable jailhouse informant testimony; junk science; prosecutorial misconduct; careless and inadequate defense counsel; and racial bias.[7] This case bears the hallmarks of at least two of them—false confessions and careless or fraudulent forensic evidence.

B. Statement of Facts

On June 3, 1982, Darrell Grayson was convicted of the capital murder of Annie Laura Orr in the Circuit Court of Shelby County, Alabama. *Grayson v. Thomson*, 257 F. 3d 1194 (11th Cir. 2001). The following day, the court sentenced him to death.

Mrs. Orr's death occurred when two men broke into her home on or about December 23, 1980, and then bound, raped and beat her. Complaint at 3. Police later discovered a trail of playing cards, which matched cards found in Mrs. Orr's home, leading to the house of Victor Kennedy. *Id.* at 4. The police learned that Mr. Grayson and Mr. Kennedy were friends, that they were together on the night of the crime, and that Mr. Grayson once worked for Mrs. Orr. *Id.* Later, police separately took Mr. Grayson and Mr. Kennedy into custody. *Id.* Mr. Grayson had no prior encounters with the law and no history of violence. Complaint, Morrison Decl., Ex. F.

On the evening of the crime, Mr. Grayson was extremely intoxicated, and he did not remember committing it until his mother told him the following day that Mrs. Orr had been murdered. Complaint at 7. Later that day, the police questioned Mr. Grayson, and on two separate occasions, Mr. Grayson stated that he and Mr. Kennedy had perpetrated the burglary and the rape. *Id.* The police interrogated Mr. Grayson again on December 26, 1980. *Id.* This

---

[7] *See generally* Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make It Right* 163-202 (2003).

time, they asked questions based on Mr. Grayson's first statement and facts they had learned from Mr. Kennedy. *Id.* Mr. Grayson gave another account of the crime, which included details he did not independently remember and were based upon the investigating officers' suggestions about what Mr. Kennedy had told them. *Id.* at 7.

In addition to the statements of Mr. Grayson and Mr. Kennedy, the police recovered physical evidence. The State performed an autopsy and collected the following evidence: spermatozoa on Mrs. Orr's vaginal and perineal swabs; a negroid hair that was stuck in the tape that was used to bind Mrs. Orr; various other hairs; the nightgown that Mrs. Orr was wearing when her body was discovered; and her bed sheet. *Id.* at 4. Police also recovered two of Mrs. Orr's rings from Mr. Grayson's wallet, which Mr. Grayson claimed never to have before seen. *Id.* at 5. A bloody shirt—identified as belonging to Mr. Grayson—was found in a swamp near Mr. Grayson's home. *Id.*

At his trial, Mr. Grayson testified in his own defense. While he did provide an account of the crime, he repeatedly explained that he was intoxicated on the night of the crime and could not independently recall the events that transpired. *Id.* at 4. He also testified that he provided the officers with details of the crime that he did not actually remember based upon what they suggested Mr. Kennedy told them.[8] *Id.*

During the State's case, the prosecutor linked Mr. Grayson to the rape and murder through the testimony of its forensic serologist, Kevin Noppinger. He testified that he performed ABO blood typing on blood samples from Mr. Grayson, Mr. Kennedy and Mrs. Orr, determining that

[8] On December 19, 2002, Mr. Grayson swore in an affidavit that he had no present recollection of the crime. (Complaint, Morrison Decl., Ex. F).

both Mr. Kennedy and Mrs. Orr had type O blood, and that Mr. Grayson has type B blood.[9] *Id.* He also performed tests on the saliva of all three individuals and determined that Mr. Kennedy was a non-secretor and Mr. Grayson is a non-secretor.[10] *Id.* Despite his conclusion that Mr. Grayson is a non-secretor, Mr. Noppinger testified that Mr. Grayson could have been the donor of the B antigens that Mr. Noppinger detected in the semen stain on Mrs. Orr's nightgown because there was a large concentration of semen in that stain. *Id.*

Mr. Noppinger's testimony was false and misleading. There is no scientific basis for Mr. Noppinger's claim that a non-secretor could have been the source of the semen in the nightgown stain. Complaint, Morrison Decl., Ex. D, Affidavit of Dr. Edward Blake at 5. This is because non-secretors are biochemically prevented from producing the water soluble blood group substances detected in the ABO typing of semen evidence. *Id.* There is also no scientific basis for asserting—as Mr. Noppinger did—that larger semen deposits or more concentrated ones that originate from non-secretors mimic or are otherwise indistinguishable from the semen deposits of secretors with regard to their ABO antigen content. *Id.* at 9. In fact, Mr. Noppinger's finding of B antigens in the semen stain on Mrs. Orr's nightgown exculpates Mr. Grayson as the source of the semen and tends to establish that someone other than Mr. Grayson was Mr. Kennedy's co-perpetrator. Complaint, Morrison Decl., Ex. D, Affidavit of Dr. Edward Blake at 10.

After hearing the evidence and the arguments of counsel, the jury deliberated for approximately two hours before

---

[9] Mr. Kennedy was executed on August 6, 1999.

[10] The blood type of a non-secretor cannot be detected in his or her bodily fluids, while the blood type of a secretor can be detected in his or her bodily fluids. Complaint, Morrison Decl., Ex. D, Affidavit of Dr. Edward Blake at 6.

returning a verdict of guilty to the charge of capital murder. *See Grayson v. Thompson*, 257 F.3d 1194, 1206-07 (11th Cir. 2001). Three weeks later, a sentencing hearing was held before the trial judge. *Id.* at 1208. The judge sentenced Mr. Grayson to death by electrocution, finding the existence of the following aggravating factors: (1) that the killing was committed while the defendant was engaged in the commission of a rape, robbery, and burglary; and (2) that the killing was especially heinous, atrocious and cruel when compared to other capital felonies. *Id.*

Mr. Grayson's conviction and sentence were affirmed on appeal. *Grayson v. State*, 479 So.2d 69 (Ala. Crim. App. 1984), *aff'd by*, 479 So.2d 76 (Ala. 1985). He then sought post-conviction relief in the Shelby County Circuit Court, which was denied and which denial was affirmed on appeal. *Grayson v. State*, 675 So.2d 1516 (Ala. Crim. App. 1995). Mr. Grayson then sought federal habeas relief, the denial of which was affirmed by the Eleventh Circuit. *Grayson v. Thompson*, 257 F.3d 1194 (11th Cir. 2001).

The biological evidence from this case has been preserved, and it is currently in the possession of the Shelby County District Attorney's Office. Complaint at 7. On September 23, 2002, Mr. Grayson filed and served on Defendant Owens a Motion to Obtain Evidence in Possession of the District Attorney of Shelby County, Alabama for DNA Testing. *Id.* On or about October 9, 2002, now-former Attorney General Bill Pryor filed a motion opposing the release of biological evidence for DNA testing. *Id.* The Circuit Court of Shelby County issued an order denying Mr. Grayson's Motion to Obtain Evidence on the ground that the court lacked jurisdiction to entertain it. *Id.* at 7-8.

C. The Proceedings Below

This petition arises from the dismissal of petitioner Grayson's lawsuit against the State seeking access to the

potentially exculpatory biological evidence that it used against him at trial for the purpose of STR DNA testing. Specifically, Mr. Grayson seeks access to the biological evidence recovered from the victim's nightgown and bed sheet, and the shirt allegedly belonging to Mr. Grayson. Both the district court and circuit court held that Mr. Grayson's complaint should be dismissed for failure to state a claim upon which relief can be granted. Challenging the ruling of the court below, this petition argues that Mr. Grayson has stated a claim for the violation of his rights under the Fourteenth Amendment to the United States Constitution based on the State's refusal to provide him with access to the potentially exculpatory biological evidence that it used against him at trial for the purpose of STR DNA testing.

1. *The district court's opinion.* On September 15, 2005, the district court dismissed Mr. Grayson's complaint for failure to state a claim upon which relief can be granted. Despite repeated allegations in the complaint that DNA testing of the potentially exculpatory biological evidence that the State used against Mr. Grayson at trial could prove that he was not the perpetrator of the crime for which he was convicted and sentenced to death, the district court found that "the Plaintiff, given repeated opportunities to do so, has not cited any legal authority that he has a constitutional right to DNA evidence when that evidence would *not* prove his innocence." App. 32a (emphasis added). The district court reasoned that a DNA exclusion would not exonerate Mr. Grayson because "at best it could only prove that he did not rape the victim—not that he did not kill her as charged." *Id.* The district court noted that Mr. Grayson admitted that he raped the victim in his trial testimony and that other physical evidence established his guilt for murder during a burglary. *Id.* For these reasons, the court held that "'the appropriate circumstances are not presented here to recognize a

§ 1983 claim for access to biological evidence.'" *Id.* (quoting Rep. and Rec.).

In dismissing Mr. Grayson's claim, the court adopted the Report and Recommendation of Magistrate Judge Harwell G. Davis III, which acknowledged that in "appropriate circumstances," a plaintiff convicted at least in part on the basis of biological evidence, before the advent of DNA testing, might be able to state a claim under § 1983 for access to the evidence for the purpose of DNA testing. App. 45a. However, he concluded, this case does not present such "appropriate circumstances" because Mr. Grayson confessed at trial and has never asserted his innocence.

2. *The court of appeals' opinion.* An Eleventh Circuit panel heard oral argument on Monday, August 14, 2006. Four days later, it issued a thirty-one page opinion affirming the district court's decision. The court of appeals' opinion rejected Mr. Grayson's arguments that he has a constitutional right of access to the biological evidence presented at trial under both *Brady v. Maryland*, 383 U.S. 83, 83 S.Ct. 1194 (1963), and *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, as well as their respective progeny. It also rejected Mr. Grayson's argument that STR DNA testing could definitely establish his innocence.

In *Brady*, this Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 383 U.S. at 83. Mr. Grayson cited authorities including *Godschalk v. Montgomery County District Attorney*, 177 F. Supp.2d 366 (E.D. Pa. 2001), and *Osborne v. District Attorney's Office for Third Judicial Dist.*, 445 F.Supp.2d 1079 (D. Alaska 2006), for the proposition that *Brady* provides a post-conviction right of access to biological evidence for the purpose of DNA testing. The court of

appeals' *Brady* analysis hinged on its conclusion that the rule of *Brady* is "grounded in a defendant's right to a fair trial." App. 15a. After noting that Mr. Grayson did not allege that the biological evidence to which he seeks access was suppressed at trial, the court rejected Mr. Grayson's argument that courts have extended prosecutors' *Brady* obligations to the post-conviction setting. *Id.* at 16a.

In *Mathews*, 424 U.S. at 323, this Court announced that the following three factors should be balanced to determine the specific dictates of due process in particular cases:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. Mr. Grayson argued that a proper balancing of the *Mathews* factors weighs in favor of a right of access to potentially exculpatory biological evidence for the purpose of post-conviction DNA testing.

The court of appeals rejected Mr. Grayson's *Mathews*-based procedural due process argument. Without finding that Mr. Grayson has a protected interest in guarding against the wrongful deprivation of his life, the court nevertheless concluded that any such interest is outweighed by the other *Mathews* factors. App. 24a. Regarding the second factor, the court reasoned that the risk of an erroneous deprivation of Mr. Grayson's "alleged liberty interest" is low and the probable value of STR DNA testing is slight because "his liberty interest in his life was already litigated extensively for twenty years." *Id.* As for the third *Mathews* factor, the court noted that compelling interests like "guarding against a flood of requests, protecting the

finality of convictions, and ensuring closure for victims and survivors" support the State's position. *Id.* at 25a.

More generally, the court of appeals also rejected Mr. Grayson's argument that STR DNA testing could prove that he did not commit the murder for which he was convicted and sentenced to die. Mr. Grayson argued that, at the motion to dismiss stage, the court must assume that he has no recollection of the crime and that STR DNA testing would reveal two DNA profiles, neither of which match Mr. Grayson and both of which match DNA samples in CODIS. Nevertheless, the court reasoned that, even if exculpatory, STR DNA testing "would simply indicate that a third man was involved and had raped Mrs. Orr and would not exclude Grayson's involvement in the capital murder, much less definitively show his innocence." *Id.* at 20a; 26a.

This petition followed.

REASONS FOR GRANTING THE WRIT

I. Absent this Court's Intervention to Protect Petitioner's Due Process Right of Access to the Potentially Exculpatory Biological Evidence That Was Used Against Him at Trial for the Purpose of STR DNA Testing, a Significant Risk Exists That an Innocent Man Will Be Executed.

The court of appeals expressly left open the possibility that some plaintiffs may successfully assert a post-conviction right of access to biological evidence for the purpose of DNA testing. App. 26a. It denied relief to Mr. Grayson, though, based on the "overwhelming evidence" against him, and its conclusion that "[t]he requested DNA tests, even if exculpatory, would simply indicate that a third man was involved and had raped Mrs. Orr and would not exclude Grayson's involvement in the capital murder . . . ." *Id.* This analysis falls far wide of the mark.

STR DNA testing can conclusively prove that an identifiable third party unconnected to Mr. Grayson committed the rape that is at the heart of the State's theory of the crime. Such a result would unquestionably change the entire portrait of guilt presented to the jury because even if sexual contact is not an element of a capital offense, forensic evidence of rape can both persuade a jury to convict and to apply the death penalty. *See House v. Bell*, 126 S.Ct. 2064, 2079 (2006) ("Law and society, as they ought to do, demand accountability when a sexual offense has been committed, so not only did this evidence link House to the crime; it likely was a factor in persuading the jury not to let him go free."). Moreover, such a result would clearly undermine confidence in the jury's verdict and could even conclusively prove that Mr. Grayson is innocent of the crime for which he has been sentenced to die.

a. The STR DNA Testing Mr. Grayson Seeks Could Definitively Prove That He Is Innocent of the Crimes for Which He Was Convicted.

STR DNA testing of the semen evidence in this case could definitively show that Mr. Grayson did not rape Mrs. Orr, demonstrating that his confession was false and fatally contradicting the forensic evidence connecting him to the crime. Furthermore, STR DNA testing could identify the true perpetrator if the STR DNA profile is entered into the CODIS database. As experience has demonstrated, it is possible that a database match could lead to a previously convicted rapist or murderer, which would dramatically change the entire picture of Mr. Grayson's guilt in an instant.

As discussed above, the court of appeals credited the State's argument that an STR DNA test result that links a third party to the crime could not affirmatively prove Mr. Grayson's absence from the crime scene and innocence of capital murder. App. 20a; App. 26a. This argument fails

for two reasons. First, it ignores the role that the forensic connection between Mr. Grayson and the rape of the victim played in the jury's decision to find Mr. Grayson guilty of capital murder and the trial judge's decision to impose the death penalty. And second, this argument ignores that not all third perpetrators are created equal. DNA testing that reveals that a friend or acquaintance of Mr. Grayson actually raped the victim would not negate his presence at the murder scene. But a DNA test result that reveals that a stranger with a violent history of attacking alone raped the victim could conclusively prove that Mr. Grayson was not involved in the crime. Put simply, it is possible to imagine a number of alternative theories of the crime against Mrs. Orr; the court of appeals erred when it accepted the State's inculpatory alternative theory of the crime to the exclusion of Mr. Grayson's exculpatory alternative theory of the crime.

More fundamentally, STR DNA testing can put a critical element of the theory of the crime that the State presented to the jury—the rape—to the test of objective science. The State should not be permitted to change its narrative of the case in order to deny access to probative evidence for DNA testing. *See Watkins v. Miller*, 92 F.Supp.2d 824 (D. Ind. 2000). In *Watkins*, the court granted relief to a defendant convicted of rape and murder after post-conviction DNA testing conclusively excluded him as the source of the semen recovered from the victim's body despite the state's newly crafted theory that the defendant committed the murder with another man. The court noted that the new DNA evidence "changes the picture completely" and "conclusively disproves the only theory the state presented at trial." *Id.* at 840; *see also Godschalk v. Montgomery County District Attorney's Office*, 177 F. Supp. 2d 366, 370 (E.D. Pa. 2001) (rejecting defendants' argument that results excluding plaintiff could not be completely exculpatory because

the victim had sexual relations with her fiancé the night before the assault).

As this Court has repeatedly emphasized, the fact-finding role of the jury is vital, especially in death cases. *See, e.g., Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004) (holding that a jury must find beyond a reasonable doubt facts increasing the penalty for a crime beyond the prescribed statutory maximum); *Ring v. Arizona*, 536 U.S. 584, 610, 122 S.Ct. 2428 (2002) (Scalia, J., concurring) (stating that the Sixth Amendment requires that a jury, and not a judge, find the existence of facts that would raise the defendant's sentence from life in prison to death); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). In assessing whether exculpatory DNA test results could affect the outcome of a trial, Sixth Amendment considerations require that this analysis proceed by reference to a jury and its deliberative process. In other words, the germane question is not whether rape was an element of Mr. Grayson's felony murder conviction, but rather whether the accusation and evidence of rape played a key role in the jury's finding of guilt and the trial judge's imposition of the death penalty. Here, the rape figured prominently in the State's case.

Last Term, this Court recognized in *House v. Bell*, 126 S.Ct. 2064, 2079 (2006) that forensic evidence connecting a defendant to rape can greatly influence a jury's deliberations on both guilt and the application of the death penalty, even where rape is not a charged offense. In such cases, "[w]hen the only direct evidence of sexual assault drops out of the case, so, too, does a central theme in the State's narrative linking [the defendant] to the crime." *Id.* Here, the centrality of rape in the State's narrative is sim-

ilarly undeniable, as it presented forensic evidence linking Mr. Grayson through the rape to the murder. Complaint at 5-6. It is also clear that the rape influenced the courts that have reviewed Mr. Grayson's conviction; indeed, the Eleventh Circuit mentioned the rape over thirty times in its opinion affirming the denial of habeas relief to Mr. Grayson. *Grayson v. Thompson*, 257 F.3d 1194 (11th Cir. 2001). If STR DNA testing proves that Mr. Grayson did not rape Mrs. Orr, then, like in *House*, a central theme in the State's narrative linking Mr. Grayson to the crime would drop out of the case.

b. Post-Conviction Exonerations Show that Exculpatory STR DNA Results Can Demonstrate Innocence Despite Apparently Overwhelming Evidence of Guilt.

It is beyond dispute that DNA testing has repeatedly exonerated convicted murderers and rapists where evidence of their guilt appeared overwhelming. In each of these cases a jury found the defendant guilty *beyond a reasonable doubt.*[11] Yet despite the presence of the "overwhelming evidence" that led to these convictions, DNA testing was able to definitively prove the innocence of each of the convicted individuals. If these individuals had not been given the opportunity to prove their innocence through DNA testing, many of them could have spent their lives in prison and fourteen could have been executed. Moreover, in many of these cases, the true perpetrators of the crimes—conclusively identified by the same DNA tests that exonerated those who were wrongly con-

---

[11] *See In re Winship*, 397 U.S. 358, 365, 90 S.Ct. 1068 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

victed—would have remained free to commit additional crimes.[12] DNA testing has the ability to provide a similar result in Mr. Grayson's case as it did in the following cases in which convicted murderers were exonerated in the face of seemingly overwhelming evidence of guilt presented at their trials. To be sure, none of them provide a perfect analogy to Mr. Grayson's case. But taken together, these and other cases among the 187 DNA exonerations illustrate the profound capacity of DNA testing to exonerate wrongly convicted individuals in wide varieties of factual circumstances.

1. *Christopher Ochoa and Richard Danziger.* In 1988, Nancy DePriest was raped and murdered in a Pizza Hut restaurant in Austin, Texas. Christopher Ochoa, a Pizza Hut employee, was brought to the police station for questioning a few weeks later and after a lengthy interrogation, he gave a detailed confession to the crime, telling police that he committed it along with his roommate and fellow employee, Richard Danziger. Mr. Ochoa ultimately pled guilty and later testified at Mr. Danziger's trial, providing details of the crime that were not available to the public. On the stand, Mr. Ochoa testified that he and Mr. Danziger raped Ms. DePriest and that he, Mr. Ochoa, shot her.

---

[12] Robert Clark's case illustrates both the danger to society that is posed by wrongful convictions and the ability of STR DNA testing to close unsolved cases. In 1981, Mr. Clark was sentenced to life in prison for the abduction of a Georgia woman. After serving twenty-four years in prison, STR DNA testing exonerated Mr. Clark. When authorities entered the STR DNA profile from Mr. Clark's case into CODIS, they found a match to Floyd Arnold, who was awaiting his release from prison on a cruelty to children conviction. Within a week, authorities linked Mr. Arnold to several unsolved attacks, charging him in one. Each of these crimes occurred while Mr. Clark was in prison for a crime that Mr. Arnold had committed. *See* Bill Rankin, *Rape Case Shifts to New Suspect*, Atlanta Journal and Constitution, Dec. 15, 2005, at E2.

Mr. Ochoa served almost a decade in prison without proclaiming his innocence. Then, the real killer, Achim Marino, confessed to the murder in a letter to Governor George W. Bush. Even then, when a homicide detective approached Mr. Ochoa in prison, he maintained that his inculpatory trial testimony was truthful. Mr. Ochoa and Mr. Danziger were exonerated in 2001 after DNA testing of the semen recovered from the victim conclusively excluded them and matched Mr. Marino's DNA. Mr. Ochoa later explained that he had confessed and pled guilty because the interrogating officers repeatedly threatened him with the death penalty.[13]

The Ochoa case demonstrates that a confession, even one presented at trial, is not dispositive of guilt. Though it is difficult for most people to understand, it is clear that many innocent individuals have falsely confessed to crimes.[14] Here, there is substantial reason to doubt Mr. Grayson's confessions. But like in the Ochoa case, STR DNA testing can resolve any uncertainty about his guilt or innocence.

2. *Douglas Warney.* In 1996, Douglas Warney confessed to a stabbing murder in Rochester, New York. That confession was the linchpin of his conviction, even though it was rife with inconsistencies and he recanted it shortly after his arrest.

---

[13] *See* Jim Yardley, *Texas Inmate's Confession Slips Through the Cracks*, New York Times, Oct. 17, 2000, at A20; Mark Wrolstad, *Hair-Matching Flawed as a Forensic Science: DNA Testing Results Reveals Dozens of Wrongful Verdicts*, Dallas Morning News, March 31, 2002, at 1A; Robert Earle & Carl Bryan Case, Jr., *The Prosecutorial Mandate: See That Justice is Done*, 86 Judicature 69, 71-72 (September-October 2002).

[14] *See* http://www.innocenceproject.org/causes/ (last visited November 13, 2006) (stating that false confessions played a role in thirty-five of the first 130 DNA exonerations).

Mr. Warney's motion for DNA testing under New York's statute was denied by a judge who found that even a favorable DNA test result could not prove his innocence. App. 54a-57a. That court characterized Mr. Warney's argument that DNA testing could result in a CODIS database match as "speculative" and "improbable." *Id.* at 57a. Nevertheless, the State opted to test the evidence, and the results excluded Mr. Warney as the source of the biological evidence. The testing also produced a CODIS hit that identified a convicted murderer. When investigators approached that individual in prison, he confessed to committing the crime alone. *See id.* at 50a-53a.[15] Today, Mr. Warney is a free man.

The Warney case demonstrates how the narrative of a crime can change instantly when an identifiable third party is linked to it through STR DNA testing. Of course, it cannot be demonstrated in advance that STR DNA testing will exclude Mr. Grayson as the source of the biological evidence in his case, generate a CODIS hit and result in a third party confession that conclusively proves Mr. Grayson's innocence; that chain of events could not have been demonstrated in advance in the Warney case either. But the possibility that such a chain of events could occur—as it has repeatedly—must be considered when weighing the potential probative value of STR DNA testing in this case.

3. *Jeffrey Deskovic.* In 1990, Jeffrey Deskovic was convicted of the rape and murder of a high school classmate in Peekskill, New York. Mr. Deskovic, a high school sophomore at the time, confessed after six hours of questioning by two detectives. Mr. Deskovic was convicted even though primitive DNA test results presented at trial showed that he was not the source of semen recovered

---

[15] *See also* Gary Craig, *Justice's 10-Year Detour Ends For Innocent Man*, Democrat and Chronicle, May 17, 2006, at 1A.

from the victim's body. Prosecutors explained away the exculpatory DNA test result by speculating that the victim might have had another sexual encounter.

Eventually, the district attorney agreed to enter the evidence in the CODIS database. Prosecutors discovered that the semen evidence matched the STR DNA profile of a man who was then incarcerated for another murder. Approached by prosecutors, that man confessed to the murder. Mr. Deskovic was cleared and released from prison.[16]

The Deskovic case demonstrates that STR DNA testing can conclusively prove innocence by identifying the true perpetrator in the CODIS database even in cases where a mere STR DNA exclusion could not conclusively prove innocence. Prosecutors did not use the biological evidence against Mr. Deskovic at trial; indeed, it exculpated him even then. But STR DNA testing on the same evidence definitively exonerated Mr. Deskovic by leading prosecutors to the true perpetrator. Moreover, the true perpetrator provided such compelling evidence that he committed the crime alone that it short-circuited any possible argument that Mr. Deskovic participated in the crime at all. The lesson for Mr. Grayson's case is that STR DNA testing should not be denied based on the notion that an exculpatory STR DNA test result "would simply indicate that a third man was involved and had raped Mrs. Orr and would not exclude Grayson's involvement in the capital murder, much less definitively show his innocence," App. 20a, when experience shows that STR DNA testing can conclusively prove innocence even in cases where it is possible to imagine alternative theories of the defendant's guilt that would be consistent with an exclusionary STR DNA test result.

---

[16] *See* Fernanda Santos, *DNA Testing Frees Man Imprisoned for Half His Life*, New York Times, Sept. 21, 2006, at B1; Jonathan Bandler, *Wrongly Imprisoned, Deskovic is Formally Cleared in Slaying*, The Journal News, Nov. 2, 2006, at 1A.

II. The Existence of a Post-Conviction Right of Access to Potentially Exculpatory Biological Evidence for the Purpose of STR DNA Testing Is a Question of National Importance and the Decision of the Court Below Is Wrong and Contrary to this Court's Precedents.

DNA testing has undeniably revolutionized the criminal justice system in this country. No doubt mindful of the parade of DNA exonerations, President George W. Bush has endorsed a dramatic expansion of the use of "DNA evidence to prevent wrongful conviction," proclaiming that "[i]n America, we must make doubly sure no person is held to account for a crime he or she did not commit."[17] Although the overwhelming majority of states have passed statutory mechanisms to allow convicted defendants to seek such testing, Alabama has tragically failed in this regard. Mr. Grayson has therefore turned to the federal courts to vindicate his right of access to potentially exculpatory evidence used at trial to convict him. Not only is the right of access a question of life or death for Mr. Grayson, it is also "one of the most important criminal law issues of our day." *Harvey v. Horan*, 285 F.3d 298, 304 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc). As the district court in *Wade v. Brady*, 2006 WL 3051770, at *1 (D. Mass. 2006), recently stated, "[t]he advent of DNA testing has been a watershed development for criminal law and criminal procedure, allowing for a qualitative advance in the determination of guilt or innocence." Unfortunately, "[t]he legal progress . . . has lagged behind the technological progress." *Id.* Indeed, the DNA testing that is now virtually standard procedure in the pre-trial investigation of all violent

---

[17] President George W. Bush, 2005 State of the Union Address, *available at* http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html (last visited November 13, 2006).

crimes remains more the exception than the rule in the post-conviction setting.

Various federal and state courts have spoken on the question presented by this petition, but jurists are looking to this Court to settle the question. *See Harvey v. Horan*, 278 F.3d 370, 388 n.7 (4th Cir. 2002) (King, J., concurring) ("[I]t may be that the significant interest of our constitutional system in ensuring justice requires, under the Due Process Clause, that prisoners enjoy access to evidence for the purpose of DNA testing. That, however, in my view, is not an issue within our bailiwick; if any such right exists, it must be recognized by judges of a higher pay grade than those of this Court."). As of this filing, at least six other cases that raise virtually the same question were percolating in the lower federal courts. *See McKithen v. Brown*, No. 03-0168 (2d Cir.); *Savory v. Lyons*, No. 06-1296 (7th Cir.); *Moore v. Lockyer*, No. 06-15016 (9th Cir.); *Osborne v. District Attorney's Office for the Third Judicial District*, No. 06-35875 (9th Cir.); *Cunningham v. King*, No. 06-376-KD-M (S.D. Ala.); *Wade v. Brady*, No. 04-12135-NG (D. Mass.).

The present case offers a particularly suitable vehicle to resolve the question presented. This Court has denied at least one other petition for a writ of certiorari involving a substantially similar question. *See Alley v. Key*, 2006 WL 1313364 (6th Cir. 2006), *cert. denied*, 126 S.Ct. 2973 (2006). The distinctions between *Alley* and this case, however, demonstrate precisely why this case is an ideal vehicle for resolving this important question. In *Alley*, the petitioner had twice been denied post-conviction DNA testing under Tennessee's statute when he sought relief from this Court on a hastily developed record as his execution loomed. Indeed, in affirming the dismissal of his § 1983 claims, the Sixth Circuit stated that Mr. Alley's case and "its expedited briefing schedule" did not encour-

age a "definitive ruling." *Id.* at *1. In fact, fewer than forty days passed between the filing of Mr. Alley's complaint and the Sixth Circuit's decision.

Mr. Grayson's petition comes to this Court on a far less hasty trajectory. The State has yet to set an execution date, and the narrow question presented by this petition has been thoroughly and deliberately litigated below. Indeed, the question presented by this petition was squarely presented to the court of appeals, which framed it as follows: "[T]his appeal now presents the issue of whether a defendant has a federal constitutional right to post-conviction access to biological evidence for DNA testing." App. 14a. This Court should seize the opportunity to answer this vitally important question.

a. Under *Brady v. Maryland* and Its Progeny, There Exists a Limited Due Process Right of Access to Biological Evidence for the Purpose of STR DNA Testing.

In rejecting Mr. Grayson's assertion that a right of access exists under *Brady v. Maryland*, 383 U.S. 83 (1987) and its progeny, the court of appeals held that the State's *Brady* obligations do not extend beyond a defendant's conviction. App. 18a. Additionally, the court of appeals stated that Mr. Grayson had "cited absolutely no authority for the proposition that *Brady*'s constitutional rule—i.e., the state's disclosure obligation—extends beyond a defendant's conviction." *Id.* at 16a. The court of appeals' conclusion with respect to *Brady* is flatly wrong.

Mr. Grayson cited two federal district court decisions recognizing that the precise right that he asserts is grounded in *Brady*. *See Osborne v. District Attorney's Office for Third Judicial Dist.*, 445 F.Supp.2d 1079 (D. Alaska 2006) (holding that "there *does* exist, *under the unique and specific facts presented*, a very limited con-

stitutional right to the testing sought"); *Godschalk v. Montgomery County District Attorney*, 177 F. Supp.2d 366 (E.D. Pa. 2001) (recognizing a due process right to potentially exculpatory biological evidence for the purpose of DNA testing). Mr. Grayson also cited two court of appeals decisions in which the right he asserts was the subject of favorable discussion. *See Harvey v. Horan*, 285 F.3d 298, 317 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) (finding that under the due process clause, "there does exist such a post-conviction right of access to [biological] evidence"); *Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992) (holding, in the habeas context, that a post-conviction right of access to potentially exculpatory biological evidence exists under *Brady*). Each of these cases explicitly recognizes the logical extension of *Brady* requiring post-conviction access to evidence for the purpose of DNA testing.[18] Additionally, subsequent to the decision below, another federal court held that "the Due Process principles underlying *Brady* . . . support a DNA testing right in both the pretrial and post-conviction settings." *See Wade v. Brady*, 2006 WL 3051770, at *2 (D. Mass. Oct. 27, 2006).

Federal courts have recognized that *Brady* imposes duties which continue through post-conviction proceedings. *See, e.g., Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997) ("[T]he duty to disclose is ongoing and extends to all stages of the judicial process."); *Thomas*, 979 F.2d at 749-50 ("We do not refer to the state's past duty to turn over exculpatory evidence at trial, but to its present duty

[18] The court of appeals did not cite to *Thomas* or *Osborne*, although it did cite to an earlier state court decision in *Osborne* relating to the defendant's ineffective assistance claim. *See Osborne v. State*, 110 P.3d 986 (Alaska Ct. App. 2005). Additionally, the court of appeals did not discuss Judge Luttig's *Brady* analysis in his *Harvey* concurrence. Nor did the court of appeals attempt to distinguish *Godschalk*'s holding that there does exist a post-conviction right of access to DNA testing under *Brady*.

to turn over exculpatory evidence relevant to the instant habeas corpus proceeding."). Indeed, this Court has characterized the *Brady* obligation as "ongoing," and also has commented that prosecutors who receive exculpatory evidence after a conviction have an ethical duty to disclose that information. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 60, 107 S.Ct. 989 (1987) ("[T]he duty to disclose is ongoing."); *Imbler v. Pachtman*, 424 U.S. 409, 427, 96 S.Ct. 984 n.25 (1976) ("[A]fter a conviction is obtained, the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.").

Similarly, the courts have repeatedly applied these same principles in the context of requests for post-conviction access to biological evidence for the purpose of DNA testing. In *Wade*, 2006 WL 3051170, at *1, the plaintiff brought a § 1983 action seeking access to biological evidence for the purpose of DNA testing after his motions for DNA testing were rejected by the state courts without comment. The district court noted that while *Brady* itself focuses on pre-trial disclosure obligations, "that is not the end of the analysis" because *Brady* "did not foreclose, either explicitly or implicitly, the existence of analogous obligations in the post-conviction context." *Id.* The district court explained that this Court imposed the *Brady* disclosure requirements "based on the belief that innocent defendants would be punished if the State denied them access to exculpatory evidence" and "[t]he same risk persists in the post-conviction setting." *Id.* at *2.

The *Wade* court, noting that this Court has not considered the applicability of *Brady* to requests for post-conviction access to DNA testing, explained that "*Brady* has been expanded from its limited core to various contexts not specifically contemplated by the Court's initial holding" and that each such expansion "represents an attempt

by the Court to balance the goal of avoiding wrongful convictions without imposing prohibitive costs on the criminal justice process." *Id.* at *13. After discussing the unprecedented advance represented by STR DNA testing, the court explained that the ability of DNA testing to definitively determine innocence or guilt—unlike any other type of new evidence—justified applying *Brady*'s principles in the post-conviction setting. *Id.* at *16.

Similarly, in *Harvey v. Horan*, 285 F.3d 298, 317 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc), Judge Luttig wrote that he would have held that a right of access to potentially exculpatory biological evidence exists had plaintiff's case not been mooted by the passage of a post-conviction DNA testing statute in Virginia. Although Judge Luttig noted that the right he would have recognized is not the classic fair trial protection offered by *Brady*, he made clear that the right draws from the principles underlying *Brady* and its progeny. *Id.* at 310-11. Judge Luttig explained: "[A]t least where the government holds previously-produced forensic evidence, the testing of which concededly could prove beyond any doubt that the defendant did not commit the crime for which he was convicted, the very same principle of elemental fairness that dictates pre-trial production of all potentially exculpatory evidence dictates post-trial production of this infinitely narrower category of evidence."[19] *Id.* at 317.

The plaintiff in *Godschalk v. Montgomery County District Attorney*, 177 F. Supp.2d 366 (E.D. Pa. 2001), sought DNA testing to prove that he was not guilty of two rapes to which—like Mr. Grayson—he had confessed. The *God-*

[19] After the district court had found that Mr. Harvey had a right of access to the biological evidence under *Brady*, *see Harvey v. Horan*, 2001 WL 419142 (E.D. Va. 2001), the Fourth Circuit reversed on other grounds. *Harvey v. Horan*, 278 F.3d 370, 378-79 (4th Cir. 2002). As mentioned above, the case was ultimately mooted.

schalk court held that the plaintiff had a right of access to the potentially exculpatory biological evidence despite the fact that he had given what the court referred to as an "uncoerced, detailed confession." *Id.* at 369. The court explained: "[I]f by some chance no matter how remote, DNA testing on the biological evidence excludes plaintiff as the source of the genetic material from the victims, a jury would have to weigh this result against plaintiff's uncoerced, detailed confessions to the rapes." *Id.* at 370. For this reason, the court concluded that DNA testing could provide "material exculpatory evidence" within the meaning of *Brady* and *U.S. v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985), and thus held that Mr. Godschalk had a "due process right of access to the genetic material for the limited purpose of DNA testing."[20] *Godschalk*, 177 F.Supp.2d at 370; *see also Osborne v. District Attorney's Office for Third Judicial Dist.*, 445 F.Supp.2d 1079 (D. Alaska 2006) (relying on, among other authorities, Judge Luttig's concurrence in *Harvey* in holding that "there does exist . . . a very limited constitutional right to the [access to the biological evidence for the purpose of the DNA] testing sought").

Mr. Grayson is asserting a limited right of access under *Brady* to potentially exculpatory biological evidence used against him at trial for the purpose of STR DNA testing. Although the STR DNA testing that he seeks can prove whether he is innocent or guilty of the crime for which he was convicted, the court of appeals' decision denies Mr. Grayson access to the evidence because his trial ended long before the advent of this revolutionary technology. Surely, the Constitution requires more.

---

[20] Mr. Godschalk was ultimately released from prison after DNA testing established that he was not the source of the semen recovered from the victims. *See* Michael Rubinkam, *DNA Evidence Frees Man Jailed Since '87 in Rape of 2 Women; Prosecutor to Seek Dismissal of Charges*, Pittsburgh Post-Gazette, Feb. 15, 2002, at B2.

b. The Court of Appeals Incorrectly Applied this Court's *Mathews v. Eldridge* Balancing Test, as the *Mathews* Factors Weigh Heavily in Favor of the Right that Mr. Grayson Invokes.

The court of appeals' analysis of Mr. Grayson's argument that he has a procedural due process right of access under *Mathews v. Eldridge*, 424 U.S. 319 (1976), to the potentially exculpatory biological evidence that was used against him at trial is likewise incorrect. First, Mr. Grayson does have a protected interest in his life, i.e., he has a protected interest in not being wrongfully executed. And second, properly balanced, the *Mathews* factors weigh heavily in favor of the right that Mr. Grayson invokes.

The first *Mathews* factor considers the private interest that will be affected by state action. Here, Mr. Grayson faces the potentially wrongful deprivation of his life at the hands of the State. It is clear that Mr. Grayson has a protected life interest in avoiding this fate. *See Herrera v. Collins*, 506 U.S. 390, 419, 113 S.Ct. 853 (1993) (O'Connor, J., concurring) ("The execution of a legally and factually innocent person would be a constitutionally intolerable event."); *Ohio Adult Parole Authority v. Woodward*, 523 U.S. 272, 288, 118 S.Ct. 1284 (1986) (O'Connor, J., concurring) ("A prisoner under a death sentence remains a living person and consequently has an interest in his life."); *Ake v. Oklahoma*, 470 U.S. 68, 78, 105 S.Ct. 1087 (1985) ("The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling.").

The second *Mathews* factor considers the risk of an erroneous deprivation of a protected interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. The court of appeals concluded that "the risk of an erroneous depri-

vation of Mr. Grayson's alleged liberty interest is low, and the probable value of Mr. Grayson's post-conviction access to evidence is slight." App. 24a. Respectfully, the court of appeals' analysis of the second *Mathews* factor misses the point entirely. The 187 individuals who were later exonerated as a result of exculpatory DNA tests were all convicted under the beyond a reasonable doubt standard of proof and each had the opportunity to appeal and to collaterally attack their convictions. Yet in each of these cases, DNA testing exonerated these individuals.

Indeed, under this Court's precedents, Mr. Grayson's right of access to the potentially exculpatory biological evidence used against him at trial cannot turn on an ex ante evaluation of whether the testing that he seeks is likely to exclude him as the perpetrator of the crime for which he was convicted. *See Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042 (1978) ("[P]rocedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions."); *Fuentes v. Shevin*, 407 U.S. 67, 87, 92 S.Ct. 1983 (1972) ("The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing."). Instead, the appropriate inquiry under the second *Mathews* factor is whether STR DNA testing provides an essential safeguard against the erroneous deprivation of life and liberty in the context of criminal prosecutions generally. The prevalence of DNA testing in modern criminal justice answers that question with a resounding yes. *Cf. Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (taking account of the number of state statutes and judicial decisions providing the procedure at issue). Indeed, it is difficult to imagine a case today resulting in criminal charges where DNA evidence excludes the suspect as the perpetrator—even in the face of otherwise compelling evidence of guilt.

Finally, the third *Mathews* factor considers the government's interest. The court of appeals concluded that

this factor weighs heavily against Mr. Grayson because "[c]ompelling interests—e.g., guarding against a flood of requests, protecting the finality of convictions, and ensuring closure for victims and survivors—support the State's position in this case." App. 25a. These interests, however, weigh in favor of Mr. Grayson, not against him. First, the implication that a decision for Mr. Grayson would open the floodgates to such claims is belied by reality. In the more than four years since the Eleventh Circuit held that cases like this one could proceed under § 1983 in *Bradley v. Pryor*, 305 F.3d 1287 (11th Cir. 2002), there has been no flood of § 1983 plaintiffs pressing similar claims. Indeed, there has been hardly a trickle.[21] And second, the related interests of finality and ensuring closure for victims and survivors also weigh in favor of Mr. Grayson. An inclusionary DNA test result would support these interests. And in any event, the State's interest in not wrongfully executing its own citizens cannot be sacrificed on the altar of finality and closure.

Taking the *Mathews* factors together, it is clear that the *Mathews* balance weighs heavily in Mr. Grayson's favor. First, Mr. Grayson has a uniquely compelling interest in protecting against the erroneous deprivation of his life. Second, the 187 DNA exonerations to date demonstrate both that the risk that Mr. Grayson faces is neither abstract nor hypothetical and that STR DNA testing provides an unparalleled safeguard against that risk. And third, the State's interests in finality and accuracy in criminal prosecutions are served by granting Mr. Grayson access to the biological evidence.

---

[21] Other than this case, Petitioner's counsel is aware of only two cases within the Eleventh Circuit since *Bradley* in which a § 1983 plaintiff has asserted a post-conviction right of access to DNA testing. Those cases are *Grimsley v. Valeska*, No. 1:04cv609-MHT (M.D. Ala.) and *Cunningham v. King*, No. 06-376-KD-M (S.D. Ala.).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

November 16, 2006

Respectfully submitted,

DAVID BOIES
(*Counsel of Record*)
CHRISTOPHER M. GREEN
BRIAN T. KOHN
IAN M. DUMAIN
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
(914) 749-8200

PETER J. NEUFELD
VANESSA POTKIN
COLIN STARGER
INNOCENCE PROJECT
100 Fifth Avenue
New York, New York 10011
(212) 364-5340

Attorneys for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-15725
D. C. Docket No. 02-02800-CV-BE-S
(August 18, 2006)

DARRELL GRAYSON,

Petitioner-Appellant,

—versus—

TROY KING, Attorney General for the State of Alabama, in his official capacity, ROBERT E. OWENS, JR., District Attorney for Shelby County, in his official capacity, SHELBY COUNTY DISTRICT ATTORNEY OFFICE,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

Before

ANDERSON, BIRCH, and HULL,
Circuit Judges.

HULL, Circuit Judge:

Plaintiff Darrell Grayson, an Alabama prisoner sentenced to death in state court, appeals the dismissal of his 42 U.S.C. § 1983 action seeking post-habeas access to biological evidence presented at his capital murder trial so that he can subject the evidence to DNA testing. After review and oral argument, we affirm.

I. BACKGROUND

A. Offense Conduct

In June 1982, Grayson was convicted of the murder of an elderly widow, Mrs. Annie Laura Orr. The facts of the crime, as found by the state court judge who sentenced Grayson and recounted by this Court in Grayson's previous federal habeas appeal, are as follows:

> Mrs. Annie Laura Orr was an eighty-six (86) year old widow who lived alone in her house in Montevallo, Alabama. At the time of her death, she stood about five feet three inches tall, and weighted [sic] some one-hundred seventeen pounds. Her granddaughter visited her during the day of December 23rd, 1980, and found her appearing to be in good health, ambulatory, and in possession of her mental faculties. Her personal physician, Dr. Lewis Kirkland, described her as being in good health for a woman of her age.
>
> During the evening hours of December 23rd, 1980, the Defendant Darrell Grayson, Co-defendant Victor Kennedy, and two other individuals, met at Kennedy's residence, also in Montevallo, and a short distance from that of Mrs. Orr. They drank wine and played cards. Sometime shortly after mid-

night, and after the other individuals had gone, Kennedy and Grayson left Kennedy's house on foot, walking in the direction of Mrs. Orr's house. They were armed with a .38 Caliber handgun, which belonged to Kennedy. They decided to burglarize Mrs. Orr's residence in order to get some money. They had previously discussed such a burglary, that Mrs. Orr was elderly, and where she kept her money.

They entered the Orr house during the very early morning hours of December 24th, 1980, through a rear basement door. They then proceeded through the dirt basement, up several steps, and into the main living portion of the house near Mrs. Orr's bedroom. The Defendants used a flashlight to illuminate their way.

Once inside the living portion of the house they entered Mrs. Orr's bedroom where she was apparently sleeping. They subdued and beat her, striking her in the head with a blunt instrument and breaking several of her ribs. Darrell Grayson then placed a pillowcase over her head and wrapped two relatively long lengths of masking tape very tightly around her head so that when they were finished he[r] head then appeared to be that of a mummy. They then proceeded to look for money and other valuables.

When apparently they could not find a significant amount of cash, the[y] began threatening Mrs. Orr by beating her further, threatening to drown her, and firing two shots from Kennedy's pistol, into her bedroom block and wall. Also during their assault, they raped Mrs. Orr repeatedly. Darrell Grayson said he didn't want to rape Mrs. Orr but that he did

> so twice. Mrs. Orr lived through the assault of being raped, beaten, threatened, unable to see or adequately breathe, and begging her assailants not to hurt her but to take the money and leave, for a considerable period of time. She then died.

Grayson v. Thompson, 257 F.3d 1194, 1197-98 (11th Cir. 2001).

On the morning of December 24, 1980, Mrs. Orr's son discovered her dead body in her home in Montevallo, Alabama, and called law enforcement officers. *Id.* at 1198. The officers discovered a trail of playing cards leading from Mrs. Orr's home to the home of Victor Kennedy, a known burglar. *Id.* Knowing that Kennedy and Grayson had been seen together the previous night, officers began looking for Grayson on the afternoon of December 24, 1980, and discovered him "squatting in the bushes" in a wooded area near his home. *Id.* Following his arrest, Grayson confessed. *Id.* Officers also discovered Mrs. Orr's wedding rings in Grayson's wallet and obtained physical evidence from Grayson that linked Grayson to the crime. *Id.* Grayson was taken into custody. *Id.*

B. Grayson's Confessions

After waiving his *Miranda* rights, Grayson gave officers a series of statements. *Id.* at 1198-99. When interviewed by Sergeant John Pratt and Chief Troy Kirkland, Grayson told the officers that he had performed yard work for Mrs. Orr in the past, was familiar with her house, and had entered her home with Kennedy in the early morning of December 24, awakening Mrs. Orr. *Id.* at 1199. Grayson admitted that they had repeatedly raped Mrs. Orr while searching her house for valuables. *Id.* Grayson and Kennedy took the money and valuables

they found, left Mrs. Orr on her bed, and left the house. *Id.*

Within thirty minutes of this interview, Grayson again waived his *Miranda* rights and confessed to the officers again. *Id.* This time, the officers tape-recorded the confession. *Id.* Grayson again admitted that he had worked for Mrs. Orr in the past and knew the house, but claimed that the burglary and rape were Kennedy's ideas. *Id.* Grayson also claimed that he and Kennedy had consumed several gallons of wine the evening of the crime. *Id.*

Two days later, Grayson again waived his *Miranda* rights and gave another recorded statement to Captain Reed Smith. *Id.* This time, Grayson explained that he and Kennedy had been planning for a couple of weeks to rob Mrs. Orr to get money for Christmas. *Id.* They selected Mrs. Orr as a target because Grayson had worked for her and knew where she kept money. *Id.* Grayson also stated that Mrs. Orr had begged them to take her money and not hurt her. *Id.* Grayson taped a pillowcase over Mrs. Orr's face to prevent her from recognizing him, and after that, he could not understand what she was saying. *Id.* Grayson stated that both he and Kennedy raped Mrs. Orr repeatedly and unsuccessfully searched for money and other valuables. *Id.* at 1200. Grayson admitted that at one point he had taken Mrs. Orr to the bathroom and then returned her to the bedroom, where he raped her again, but he could not remember why he took her to the bathroom or what happened there. *Id.* Grayson explained that Kennedy urged him to leave the house while he was raping Mrs. Orr, and Grayson left Mrs. Orr on her bed with the pillowcase taped over her head and face as he left the house. *Id.*

C. Evidence at Trial

Grayson was tried for capital murder during a burglary. At trial, the officers described the crime scene, the physical evidence, including the playing cards that led to Kennedy's house, and the circumstances leading to Grayson's arrest. *Id.* at 1201. The officers also recounted their discovery of Mrs. Orr's wedding rings in Grayson's wallet and the bloody shirt belonging to Grayson in the woods near his home. *Id.* at 1198, 1201. The transcripts of Grayson's confessions were admitted into evidence. *Id.*

The State additionally presented expert testimony about the crime scene. For example, the State's trace evidence expert testified about the comparison of hairs recovered from the crime scene and hairs taken from Grayson and Kennedy. *Id.* at 1202. The expert explained that several hairs recovered at the crime scene had "negroid" characteristics consistent with Grayson's and Kennedy's hair and inconsistent with the victim's, but that the hairs were too small to allow an individual comparison of them with Grayson's and Kennedy's samples. *Id.* The expert also testified that a hair recovered from Grayson's sock following his arrest was consistent with the victim's head hair and inconsistent with Grayson's, but the expert could not opine as to whether the hair was the victim's. *Id.*

The State's fingerprint expert testified that the latent fingerprints lifted from Mrs. Orr's home and on evidence were insufficient to allow analysis. *Id.* at 1201-02. The State's ballistics expert testified that the two bullets found in the wall between Mrs. Orr's bedroom and bathroom and on the floor in her bedroom were of the .38 caliber size and were fired from the same weapon, likely a Smith and Wesson revolver. *Id.* at 1202. The expert further testified that the hole in a shattered clock in Mrs.

Orr's home also was consistent with a .38 bullet. *Id.* However, on cross-examination, the ballistics expert testified that the police had not given him a gun that matched up with the bullets. *Id.* at 1203.

The State's serology expert testified that bloodstains found on a pillowcase and a bed spread in Mrs. Orr's bedroom could not be typed; nor could urine and semen stains found on a bed sheet recovered from Mrs. Orr's bathroom. *Id.* at 1202.[1] The expert also testified that the bloodstains on Grayson's shirt recovered from the woods near his house were type O and could have come from either Mrs. Orr or Kennedy, both of whom were type O, but could not have come from Grayson, who is type B. *Id.* The serology expert testified that a large blood and semen stain on Mrs. Orr's nightgown was type B, which was consistent with Grayson's blood.[2] *Id.*

---

[1] Dr. Joseph Embry, who performed the autopsy of Mrs. Orr, collected this evidence: (1) spermatozoa on Mrs. Orr's vaginal and perineal swabs; (2) a "negroid" hair that was stuck in the tape used to bind Mrs. Orr; (3) various other hairs; (4) the nightgown that Mrs. Orr was wearing; and (5) Mrs. Orr's bed sheet.

[2] On cross-examination, defense counsel focused on the fact that Grayson was a "non-secretor," meaning that Grayson ordinarily would not secrete his blood type into bodily fluids in detectible amounts. *Grayson*, 257 F.3d at 1203. Defense counsel noted that the semen was mixed evenly with blood, which could have produced the type B reading. *Id.*

In this appeal, Grayson seems to argue that the fact that the semen and blood stains on Mrs. Orr's nightgown could be typed as B suggests that Grayson was not the perpetrator of the rape—even though Grayson has type B blood—because Grayson is a non-secretor. However, this argument is meritless because, as defense counsel noted, the stain itself was a mixture of seminal fluid and some blood. In addition, at most this might show a third party was involved in the rape but would not show that Grayson did not commit the murder during a burglary—the only crime of conviction.

D. Grayson's Trial Testimony

At trial, Grayson testified on his own behalf. Defense counsel walked Grayson through the events of the night of the murder, starting with Grayson's and Kennedy's alcohol consumption. *Id.* Grayson testified that they left at about midnight to rob Mrs. Orr. *Id.* This time Grayson stated that they robbed Mrs. Orr because Kennedy needed money, suggested that they rob someone, and spotted the Orr house. *Id.*

In his trial testimony, Grayson admitted to the burglary, rape, and murder, but testified that he did not remember many of the details. *Id.* at 1203-04. Specifically, Grayson testified that he did not recall beating or hitting Mrs. Orr or taking her into the bathroom, taking her wedding rings or placing them in his wallet. *Id.* at 1203. At trial, Grayson admitted on direct and cross-examination that he raped Mrs. Orr at least once. *Id.* at 1203-04. Grayson also testified that he raped Mrs. Orr only at Kennedy's urging, and that he did not intend to murder Mrs. Orr. *Id.* Grayson testified that Mrs. Orr was still alive when he left the house at Kennedy's urging; he knew she was still alive because she was "making moaning noises like she was trying to say something." *Id.* Grayson did not remember the murder until the next day, when his mother told him that Mrs. Orr had been killed. *Id.* at 1204. At that point, Grayson recalled his involvement and hid the bloodstained shirt he had worn the night before. *Id.*

On cross-examination, Grayson stated that he had told officers details he did not remember based on their suggestions of what Kennedy had said about the events the night of the murder. *Id.* However, Grayson admitted that he and Kennedy had been planning the robbery for a week and that they picked Mrs. Orr's house because he was familiar with it. *Id.* Grayson further admitted that he

had raped Mrs. Orr at least once; wrapped the pillowcase around Mrs. Orr's head to keep from being identified, even though he had not worked for her in two years and did not believe she would be able to recognize him; and had not loosened the pillowcase around Mrs. Orr's head, even though he was the last one to leave her bedroom. *Id.*

Grayson was indicted and convicted for nighttime burglary of an occupied dwelling during which an occupant of said dwelling was intentionally killed by the defendant, in violation of Alabama Code § 13A-5-31(A)(4) (1975) (repealed).[3] The murder was a capital offense because it occurred during a burglary of an inhabited dwelling. *See Grayson v. State,* 479 So. 2d 69, 71 (Ala. Crim. App. 1984); *Grayson v. State,* 675 So. 2d 516, 519 (Ala. Crim. App. 1995) (noting that Grayson "was convicted of murder made capital because it was committed during a burglary"). Grayson was not indicted for rape nor capital rape-murder.

E. Sentencing

At the sentencing phase, the State presented no additional evidence. *Grayson,* 257 F.3d at 1207. In closing arguments, the State emphasized the brutality of the crime, that Mrs. Orr's death was slow and agonizing, and that she had been beaten and raped, and argued that these circumstances outweighed any mitigating circumstances. *Id.* The jury determined that Grayson should be sentenced to death. *Id.*

After the jury's recommendation, the judge held a sentencing hearing, at which the State presented no further evidence. *Id.* at 1207-08. The state trial court sentenced

---

[3] Capital offenses are now set forth in Alabama Code § 13A-5-40.

Grayson to death, finding the following aggravating factors: "(1) that the killing was committed while the defendant was engaged in the commission of a rape, robbery, and burglary and (2) that the killing was especially heinous, atrocious and cruel when compared to other capital felonies." *Id.* at 1208. The trial court further explained:

> The Court finds that the actions of the Defendant were completely barbaric, showing a complete and utter disregard for not only human life, but human dignity. The Court cannot think of a case it has seen, heard, or even read, that would equal the cruelty shown in this case by the Defendant to Mrs. Orr. Indeed, the Court has some difficulty imagining what more the Defendants could have done to make this crime any more heinous, atrocious, or cruel.

Id. The state trial court considered certain mitigating circumstances, including Grayson's difficult background and lack of a criminal history, but concluded that the aggravating factors and circumstances overwhelmed those mitigating circumstances. *Id.* The Alabama courts upheld Grayson's conviction and death sentence on direct appeal. *Grayson,* 479 So. 2d at 76; *Ex parte Grayson,* 479 So. 2d 76 (Ala. 1985), *cert. denied, Grayson v. Alabama,* 474 U.S. 865, 106 S. Ct. 189 (1985).

F. Post-Conviction Proceedings

For fifteen years, from 1986 to 2001, Grayson pursued state and federal habeas cases but never sought any DNA testing of the blood and semen evidence discussed at trial. In 1986, Grayson sought post-conviction habeas relief in the Alabama state courts based on evidence, *inter alia,* about his alcoholism and upbringing that he

argued his counsel should have presented at his trial. *Grayson,* 257 F.3d at 1209. Grayson did not raise any issue relating to DNA testing. In January 1993, after an evidentiary hearing, the state habeas court denied Grayson's petition for post-conviction relief. *Grayson,* 675 So. 2d at 519. In December 1995, the Alabama Court of Criminal Appeals denied Grayson's habeas appeal. *Id.* at 531.

In April 1996, Grayson filed a 28 U.S.C. § 2254 petition in the federal district court. Grayson's § 2254 petition did not raise any issue about DNA testing. In March 2000, the district court denied the petition. Grayson appealed to this Court, arguing that he was denied the effective assistance of trial counsel, that the admission of his allegedly involuntary statements to law enforcement violated his Fifth Amendment rights, and that he did not receive a fair trial or due process of law because the State of Alabama denied him sufficient funds to hire a forensic pathologist. In 2001, this Court affirmed the district court's denial of Grayson's § 2254 petition. *Grayson,* 257 F.3d at 1232. Through those fifteen years of post-conviction proceedings—in both state and federal courts—Grayson was represented by Stephen Bright, one of the foremost experts in capital defense work in the country. *See Williams v. Head,* 185 F.3d 1223, 1228 n.2 (11th Cir. 1999) (reviewing expertise of Mr. Bright). Despite the availability of Short Tandem Repeat ("STR") DNA testing, Grayson and his counsel never sought such testing. Grayson did not seek such testing until 2002, when the State requested an execution date from the Alabama Supreme Court.

G. This § 1983 Action

In 2002, Grayson first moved in the state trial court to obtain the biological evidence presented at trial so that he could have DNA testing performed on the evidence. The State, through the Attorney General, opposed the motion. As grounds, the State argued that the state trial court did not have jurisdiction over the motion, that the motion could be construed as a Rule 32 petition under Alabama law but would be subject to dismissal as successive and time-barred, and that Grayson never contested that he raped Mrs. Orr. On October 10, 2002, the State court denied the motion for lack of jurisdiction.

In November 2002, twenty years after his conviction for capital murder, Grayson filed this § 1983 action seeking access to the biological evidence used at trial. Grayson's complaint alleged that by refusing to turn over the evidence, the defendants had violated his Fourteenth Amendment rights to due process of law and equal protection, Sixth Amendment rights of confrontation and compulsory process, and Eighth Amendment right against cruel and unusual punishment. Grayson's complaint alleged that he was deprived of an opportunity to show actual innocence and to seek clemency.

In an affidavit attached to his complaint, Grayson stated that he had no recollection of the crimes against Mrs. Orr and further stated: "DNA testing was not available at the time of my trial or appeal and since I have been sentenced to death, I would like to know the truth of my guilt or my innocence." Nowhere does Grayson claim actual innocence.

Other exhibits attached to Grayson's § 1983 complaint indicate that DNA testing became available as early as 1986, more than fifteen years before Grayson sought any such testing. *See* U.S. Department of Justice, *Postcon-*

viction DNA Testing: Recommendations for Handling Requests, at 1, 26-27 (Sept. 1999), *available at* http://www.ncjrs.gov/pdffilesl/nij/177626.pdf. Indeed, the declaration of Dr. Edward Blake, attached to Grayson's § 2254 petition, states that Dr. Blake applied DNA procedures to criminal investigations beginning in the period from 1986 to the early 1990s. Grayson contends that the specific type of DNA testing he seeks—STR DNA testing—did not become widely available until the mid-1990s.[4]

The defendants moved to dismiss Grayson's § 1983 action on several grounds, including failure to state a claim upon which relief could be granted. The magistrate judge recommended that the motion be granted and Grayson's § 1983 action be dismissed. The magistrate judge's recommendation was based "in substantial part on Grayson's admission at trial, on direct examination and cross-examination, that he raped the victim and on his failure at any time, during appeal or other post-conviction proceedings, to assert that he was innocent of the charge." Plaintiff objected to the magistrate judge's report and recommendation. On September 15, 2005, the district court entered an order adopting the magistrate

---

[4] There are a number of different forms of DNA testing, with each becoming more sophisticated than the last. As the State points out, under Grayson's constitutional-right theory, even where DNA testing was available at trial and used to convict a criminal defendant, that defendant would later seek access to evidence to use a more discriminating or newly developed test. *See Harvey v. Horan*, 278 F.3d 370, 373, 378 (4th Cir. 2002) (noting that evidence used to convict Harvey was subjected to Restriction Fragment Length Polymorphism or "RFLP" DNA testing prior to trial, but Harvey sought STR DNA testing post-conviction).

judge's report and dismissing the action. Grayson appeals.[5]

II. DISCUSSION

Our circuit has held that claims seeking post-conviction access to biological evidence for DNA testing purposes may be brought as a § 1983 action. *Bradley v. Pryor,* 305 F.3d 1287, 1290 (11th Cir. 2002). Thus, Grayson's claims may proceed as a § 1983 action. Our circuit, however, has not addressed the merits of such claims. Accordingly, this appeal now presents the issue of whether a defendant has a federal constitutional right to post-conviction access to biological evidence for DNA testing. To state a claim under § 1983, Grayson must show that the denial of post-conviction access to the biological evidence deprived him of a federally protected right. Grayson seeks to satisfy this requirement by contending mainly that denial of access constitutes a violation of his rights under the due process clause of the Fourteenth Amendment.

On appeal, Grayson argues primarily that he has a constitutional right of access to the biological evidence presented at trial under two different lines of cases: *Brady v. Maryland,* 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963), and its progeny, requiring the State to turn over exculpatory evidence; and *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976),

---

[5] We review de novo the district court's dismissal of Grayson's § 1983 action. *P.G. Charter Boats, Inc. v. Soles,* 437 F.3d 1140, 1141 n.1 (11th Cir. 2006). Although the State's motion was brought under Rule 12(b)(6), we note that both the magistrate judge and the district court appeared to consider all six exhibits attached to Grayson's complaint, which included Grayson's affidavit and Dr. Blake's declaration. Thus, evidence presented by Grayson was considered without objection by the State.

requiring procedural due process protections under the Fourteenth Amendment. Thus, Grayson argues, the district court erred in dismissing his § 1983 complaint. We discuss Grayson's legal arguments in turn.

A. *Brady v. Maryland*

In *Brady,* the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S. Ct. at 1196-97. The *Brady* rule is grounded in a defendant's right to a fair trial. The Supreme Court has since explained that "unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside. . . . [T]he prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Bagley,* 473 U.S. 667, 675-76, 105 S. Ct. 3375, 3380 (1985) (quotation marks omitted); *Kyles v. Whitley,* 514 U.S. 419, 434, 115 S. Ct. 1555, 1566 (1995) (noting that the question under *Bagley* is whether, in the absence of the evidence, the defendant received a fair trial); *United States v. Agurs,* 427 U.S. 97, 108, 96 S. Ct. 2392, 2399 (1976) (stating that there is no denial of due process "unless the omission deprived the defendant of a fair trial"). The Supreme Court also explained that evidence is material, for *Brady* purposes, "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley,* 473 U.S. at 682, 105 S. Ct. at 3383.

Accordingly, *Brady* concerned the suppression of evidence prior to and during trial that was material to the proceedings and denied the defendant a fair trial. Here, Grayson makes no argument that the biological evidence was suppressed at trial, denying him a fair trial; rather, it was presented at trial, and it is beyond peradventure that Grayson received a fair trial. Grayson argues instead that the Supreme Court has extended the prosecutor's constitutional obligations under *Brady* beyond the defendant's trial and conviction. For this proposition, Grayson relies on a footnote in *Imbler v. Pachtman,* 424 U.S. 409, 427 n.25, 96 S. Ct. 984, 993 n.25 (1976), where the Supreme Court explained that "after a conviction the prosecutor . . . is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction."

Contrary to Grayson's argument, *Imbler,* does not suggest that the prosecution maintains an ongoing *due process* obligation to inform the defense of after-acquired evidence that might cast doubt on a conviction. *Imbler* simply explains that the prosecution maintains an ongoing *ethical* obligation to inform the defense of such material; it is the suppression of evidence before and during trial that carries *Brady's* constitutional implications. *Id.* Furthermore, the biological evidence Grayson seeks was not acquired after trial, but was available and used at trial, and does not cast doubt on Grayson's conviction for capital murder. Grayson has cited absolutely no authority for the proposition that *Brady's* constitutional rule—i.e., the state's disclosure obligation—extends beyond a defendant's conviction.

Grayson also relies on *Pennsylvania v. Ritchie,* 480 U.S. 39, 107 S. Ct. 989 (1987). However, *Ritchie* does not help Grayson because *Ritchie* pertained to a request

for files during the ongoing prosecution. *Id.* at 42-43, 107 S. Ct. at 993-94. The defendant Ritchie was charged with various sexual offenses against his minor daughter. *Id.* at 43, 107 S. Ct. at 994. At some point the matter was referred to the Children and Youth Services agency ("CYS"), a protective agency established by the state of Pennsylvania to investigate cases of suspected child mistreatment and neglect. *Id.* During pretrial discovery, Ritchie served CYS with a subpoena seeking access to records relating to the immediate charges as well as previous reports, but CYS refused to comply with the subpoena on the grounds that the records were privileged by Pennsylvania statute. *Id.* The Supreme Court held that under due process principles, Ritchie was entitled to have the trial court review the records to determine if they contained information "that probably would have changed the outcome of his trial," and if so, that Ritchie was entitled to a new trial. *Id.* at 58, 107 S. Ct. at 1002.

Grayson argues that *Ritchie* "controls" his claim for access to biological evidence because it establishes that a defendant has a due process right to evidence that "might" be exculpatory. As the State aptly points out, Grayson's argument saddles *Ritchie* with far more weight than it can bear. *Ritchie* concerned the pre-trial obligation to disclose to the trial court for review known, existing evidence to ensure that the defendant received a fair trial. The time for fair trial arguments has long since passed in this case. Nothing in *Ritchie* suggests that a defendant has a due process right, twenty years after receiving an indisputably fair trial at which the evidence in question was presented, to seek access to and further testing on evidence that was available at trial.[6]

---

[6] Grayson also alleges that the State's refusal to give him access to the biological evidence violates the requirements of *Arizona v. Youngblood*, 488 U.S. 51, 57, 109 S. Ct. 333, 337 (1988), in which

We thus conclude that Grayson has no valid due process right of post-conviction access to the biological evidence under *Brady* and its progeny in order to retest that evidence under new technology. Grayson received a fair trial, in which overwhelming evidence was presented against him. Indeed, Grayson confessed to the burglary, rape, and murder of Mrs. Orr and even testified at trial, admitting his crimes. Even now, Grayson does not contend that he is actually innocent but only that he does not know whether he is guilty or innocent. Under these circumstances, Grayson cannot establish that the prosecution withheld evidence that would undermine confidence in his conviction.

The only circuit court to address this issue in a published opinion is the Fourth Circuit in *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002).[7] In that case, the Fourth

---

the Supreme Court held that the prosecution violates a defendant's due process rights if it in bad faith fails to *preserve* potentially exculpatory evidence, even though the material is outside the scope of *Brady*. 488 U.S. at 58, 109 S. Ct. at 337. In *Youngblood*, the State had permitted the destruction of semen samples that, if tested, might have exonerated the defendant. The Supreme Court concluded there was no bad faith in the destruction of the evidence. *Id.* at 58-59, 109 S. Ct. at 337-38. The Supreme Court held that "unless a criminal defendant can show bad faith of the police, failure to preserve potentially useful evidence does not constitute denial of due process." *Id.* at 58, 109 S. Ct. at 337.

Grayson contends that the State's refusal to grant him access to the evidence twenty years later is the functional equivalent of bad-faith destruction of it. We disagree. The refusal to provide the evidence to Grayson is not the equivalent of destruction; the evidence is preserved and could be tested if Grayson otherwise had a right of access to the evidence, *e.g.*, under a state statute providing for such access.

[7] In an unpublished opinion, the Sixth Circuit affirmed the district court's ruling in *Alley v. Key*, 431 F.Supp. 2d 790 (W. D. Tenn. 2006), that the petitioner, a death-row inmate, had no post-conviction constitutional right to biological evidence used against him at trial for

Circuit rejected plaintiff Harvey's due process claim for post-conviction access to biological evidence against him for DNA testing. *Id.* at 376-77.[8] In so doing, the Fourth Circuit stated that "Harvey does not state a valid *Brady* claim because he is not challenging a prosecutor's failure to turn over material, exculpatory evidence that, if suppressed, would deprive the defendant of a fair trial"; rather, Harvey received a fair trial and was given the opportunity to test the DNA evidence at trial using the best technology available at the time.[9] *Id.* at 378-79.

---

purposes of DNA testing, and affirmed the resulting dismissal of the petitioner's § 1983 complaint. *Alley v. Key,* No. 06-5552, 2006 WL 1313364 (6th Cir. May 14, 2006) (unpublished), *cert. denied,* 126 S. Ct. 2973 (2006). The Sixth Circuit noted that "there exists no general constitutional right to post judgment DNA testing," and specifically rejected essentially the same due process and *Brady* claims asserted by Grayson here. *Id.* at *1-2.

[8] In *Harvey,* the Fourth Circuit decided that post-conviction claims seeking access to biological evidence for DNA testing must be brought as habeas claims rather than § 1983 claims. 278 F.3d at 377-79. This Circuit has rejected that approach, allowing such claims to proceed as § 1983 claims without determining whether a due process right to such evidence exists. *Bradley,* 305 F.3d at 1290-92. We nevertheless find instructive the *Harvey* Court's analysis of why no such due process right exists under *Brady.*

[9] Other courts to address this issue are split. *Compare, e.g., Godschalk v. Montgomery County Dist. Att'y's Office,* 177 F.Supp. 2d 366, 370 (E.D. Pa. 2001), and *Dabbs v. Vergari,* 570 N.Y.S.2d 765, 767-69 (N.Y. Sup. Ct. 1990) (recognizing a post-conviction right of access to evidence for DNA testing), *with Alley,* 431 F.Supp. 2d at 800-803 (holding that there is no post-conviction due process right to biological evidence for purposes of DNA testing), *aff'd,* 2006 WL 1313364, and *Osborne v. State,* 110 P.3d 986, 995 (Alaska Ct. App. 2005) (holding that there is no federal due process right to present new evidence of actual innocence such as DNA testing).

The district court in *Godschalk* relied on *Harvey v. Horan,* 119 F.Supp. 2d 581 (E.D. Va. 2000), in which the district court ordered dis-

Here, Grayson confessed several times, testified at trial about the murder and his role in it, and does not contend that he was denied a fair trial. Grayson also still does not contend that he is actually innocent of the capital murder—the only crime of conviction. Further, the DNA testing that Grayson seeks to perform could not show that he is actually innocent of the capital murder. Even if the tests indicated that someone other than Grayson and Kennedy raped Mrs. Orr, that result would not establish definitively that Grayson was innocent of the capital murder during a burglary, given the other evidence against Grayson, such as the discovery of Mrs. Orr's wedding rings in Grayson's wallet, his admission that he and Kennedy had planned the robbery of Mrs. Orr for a week, Grayson's bloody shirt, and Grayson's detailed confessions about how he wrapped the pillowcase around the head of Mrs. Orr, who died from asphyxiation.[10] The requested DNA tests, even if exculpatory, would simply indicate that a third man was involved and had raped Mrs. Orr and would not exclude Grayson's involvement in the capital murder, much less definitively show his innocence.

As discussed later, we do not foreclose the possibility that a § 1983 plaintiff could, under some extraordinary circumstances, be entitled to post-conviction access to biological evidence for the purpose of performing DNA testing. Instead, we simply hold that Grayson has no

---

closure of the evidence. *Godschalk*, 177 F.Supp. 2d at 369. However, the Fourth Circuit subsequently reversed the district court's *Harvey* decision. *Harvey*, 278 F.3d at 381.

[10] Grayson admitted that Mrs. Orr was selected because he had worked for her and was familiar with her house and where she kept the money. Grayson placed the pillowcase over her head to keep her from recognizing him. Grayson also admitted to hiding his bloody shirt the day after the murder.

such constitutional or federally protected right under *Brady* because the evidence was available prior to trial, he received a fair trial, and he cannot show "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley,* 473 U.S. at 682, 105 S. Ct. at 3383. In other words, the asserted right at issue is not one to material, exculpatory evidence necessary to ensure a fair trial. *See Brady,* 373 U.S. at 87, 83 S. Ct. at 1196-97.

We thus conclude that Grayson has no valid *Brady*-based claim to the biological evidence.

B. *Mathews v. Eldridge*

Grayson next argues that he has a procedural due process right of post-conviction access to the biological evidence under the balancing test established by the Supreme Court in *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976). In *Mathews,* the Supreme Court explained that "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Id.* at 332, 96 S. Ct. at 901. The Supreme Court explained that where the government seeks to deprive an individual of such an interest, the courts must consider the following factors in determining what administrative safeguards are required:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens

> that the additional or substitute procedural requirement would entail.

Id. at 335, 96 S. Ct. at 903. Thus, *Mathews,* applies only where an individual has a liberty or property interest that the government seeks to eliminate, and the *Mathews* test concerns the administrative procedures required.

To support his alleged protected liberty interest, Grayson advocates that this Court should follow the concurring opinion in the denial of rehearing en banc in the Fourth Circuit's *Harvey v. Horan,* 285 F.3d 298, 304-326 (4th Cir. 2002) (Luttig, J., concurring). The concurring opinion (1) recognized a "core liberty interest," protected by the Fourteenth Amendment, to "freedom from bodily restraint" and to pursue "freedom from confinement" that residually survives conviction and incarceration, *Id.* at 312-13, and (2) concluded that "this substantive liberty interest is protected through a *procedural* due process right to have previously-produced forensic evidence either released to the convicted individual for STR, or related, DNA testing at his or her own expense, or submitted by the government for such testing, with the test results to be provided thereafter to the convicted individual," *Id.* at 315. Thus, Grayson's claimed right of post-conviction access to biological evidence allegedly "partakes of both procedural and substantive due process." *Id.* at 318. We note that the concurrence in the *Harvey* panel opinion, however, concluded that "the balancing test of *Mathews* is only relevant when the government is depriving an individual of a 'liberty' or 'property' interest," and that Harvey had no such liberty or property interest in accessing or possessing the biological evidence relating to his rape conviction. *Harvey,* 278 F.3d at 388 (King, J., concurring).

Indeed, there were multiple opinions in *Harvey* addressing the thorny threshold issue of whether or not

a liberty interest under the due process clause residually survives final conviction and sentencing. *See id.* (King, J., concurring); *Harvey,* 285 F.3d at 299-300 (Wilkinson, J., concurring); *Harvey,* 285 F.3d at 308-26 (Luttig, J., concurring).[11] Further, in addressing the constitutionality of Ohio's clemency process, the United States Supreme Court also struggled with the issue in three separate opinions in *Ohio Adult Parole Authority v. Woodward,* 523 U.S. 272, 118 S. Ct. 1244 (1998). Chief Justice Rehnquist authored an opinion, in which three justices concurred, that stated that an "individual's interest in release or commutation is indistinguishable from the initial resistance to being confined, and that interest has already been extinguished by the conviction and sentence." *Id.* at 280, 118 S. Ct. at 1249 (quotation marks and citations omitted). Chief Justice Rehnquist recognized that a death-sentenced inmate "maintains a residual life interest, *e.g.*, in not being summarily executed by prison guards," but concluded that such an inmate "cannot use his interest in not being executed in accord with his sentence to challenge the clemency determination by requiring the procedural protections he seeks." *Id.* at 281, 118 S. Ct. at 1250. Justice O'Connor concurred in part and in the judgment. In her concurring opinion, in which three other justices joined, Justice O'Connor indicated that "[w]hen a person has been fairly convicted

---

[11] One of the *Harvey* concurrences also notes that the "asserted right at issue" in these post-conviction cases is not a constitutional claim of actual innocence. *Harvey,* 285 F.3d at 310-11 (Luttig, J., concurring); *see Herrera v. Collins,* 506 U.S. 390, 404, 113 S. Ct. 853, 862 (1993) (stating that "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits"); *Schlup v. Delo,* 513 U.S. 298, 314-15, 115 S. Ct. 851, 860-61 (1995).

and sentenced, his liberty interest, in being free from such confinement, has been extinguished," but explained that "it is incorrect . . . to say that a prisoner has been deprived of all interest in his life before his execution"; rather, "some *minimal* procedural safeguards apply to clemency proceedings." *Id.* at 289, 118 S. Ct. at 1253-54.

We need not decide whether *Mathews* could apply to this situation because, even assuming *arguendo* that Grayson has some residual, continuing liberty interest under the due process clause and that the *Mathews* test applies to deprivation of that interest, we conclude that the district court still properly dismissed Grayson's claim because the second and third *Mathews* factors overwhelm his alleged private interest.

The second *Mathews* factor—"the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"—weighs heavily against Grayson's claim. *Mathews,* 424 U.S. at 335, 96 S. Ct. at 903. As to the procedures used, Grayson already received a fair trial, a direct appeal, and both state and federal habeas proceedings and appeals. His liberty interest in his life was already litigated extensively for twenty years. As previously discussed, under the circumstances of this case, the results of the DNA testing relate to the rape and could not exculpate Grayson of the capital murder during a burglary—the only crime of conviction. Indeed, the non-biological evidence against him was and is overwhelming. For example, Grayson admitted that he and Kennedy planned the robbery a week before, the victim's wedding rings were found in Grayson's wallet, Grayson's bloody shirt was found in the woods near his home, and Grayson was discovered hiding in the woods after his mother told him of Mrs.

Orr's death. Grayson thrice confessed to the crime, testified at trial admitting his role in the crime, and still does not affirmatively assert that he is actually innocent, but only that he does not remember the details of the night of the crime. Accordingly, the risk of an erroneous deprivation of Grayson's alleged liberty interest is low, and the probable value of Grayson's post-conviction access to the evidence is slight.

As to the third factor, the government has a strong interest in the finality of duly adjudicated criminal judgments. *See, e.g., Calderon v. Thompson,* 523 U.S. 538, 555, 118 S. Ct. 1489, 1500 (1998); *Sawyer v. Whitley,* 505 U.S. 333, 338, 112 S. Ct. 2514, 2518 (1992); *Murray v. Carrier,* 477 U.S. 478, 487, 106 S. Ct. 2639, 2645 (1986). Here, Grayson has enjoyed extensive judicial process over the years; indeed, it has been over twenty years since his conviction, and he now seeks to forestall his death sentence by seeking further process with minimal probable value. Compelling interests—*e.g.,* guarding against a flood of requests, protecting the finality of convictions, and ensuring closure for victims and survivors—support the State's position in this case. This third factor also weighs heavily against Grayson's claim. Accordingly, we reject Grayson's procedural due process argument under *Mathews.*

Grayson relies heavily on the reasoning set forth in the above-mentioned concurrence in the denial of rehearing in *Harvey,* 285 F.3d at 304-26 (Luttig, J., concurring). However, that concurring opinion argues only that there is, in "limited circumstances" not fully described in the opinion, a "substantive liberty interest . . . protected through a *procedural* due process right to have previously-produced forensic evidence either released to the convicted individual for STR, or related, DNA testing . . . or submitted by the government for testing

. . . ." *Id.* at 315. However, even under that analysis, the right would be "narrowly confine[d]" and subject to "strict and limiting" standards. *Id.* at 321. For example, the concurrence would apparently restrict any such due process right to post-conviction testing to those who have "steadfastly maintain[ed]" and "persist[ed] in" their "absolute," "factual innocence." *Id.* at 318, 319. As another limiting factor, the concurrence explained: "A right of access to evidence for tests which, given the particular crime for which the individual was convicted and the evidence that was offered by the government at trial in support of the defendant's guilt, could prove beyond any doubt that the individual in fact did not commit the crime, is constitutionally required, I believe, as a matter of basic fairness." *Id.* at 315.

As explained above, Grayson's case does not fall within the limited class of cases described by the *Harvey* concurrence in the denial of rehearing. First, Grayson has never affirmatively proclaimed his actual, factual innocence of Mrs. Orr's murder. Second, the evidence here, even if tested and exculpatory as to Grayson, would not prove complete innocence of the only crime for which he was convicted—capital murder during a burglary.

Today we need not and do not decide whether there can *ever* be a post-conviction right of access to the type of biological evidence Grayson seeks for DNA testing. Rather, we simply conclude that under the particular circumstances of this case, Grayson cannot show such an entitlement. We decline Grayson's invitation to create under his various theories a new, broad constitutional right of post-conviction access of *all* convicts to the evidence used to convict them.

Nor do we question the unparalleled accuracy and surpassing importance of DNA testing in identifying and/or

excluding suspects of violent crime. However, Grayson has identified no constitutional right to such testing in every case. Meanwhile, as Grayson notes, a majority of state legislatures already have enacted post-conviction DNA testing statutes. Our decision here in no way demeans the value of DNA testing or suggests that it should not be made available post-conviction; it simply holds that Grayson has asserted no constitutional right to it under the factual circumstances of the case. *See Harvey*, 278 F.3d at 376-77 (noting legislative activity in this area).

III. CONCLUSION

For the above reasons, we affirm the district court's dismissal of Grayson's § 1983 complaint seeking post-conviction access to biological evidence presented at his trial for DNA testing.[12]

AFFIRMED.

---

[12] If there were a post-conviction constitutional right to DNA testing, as Grayson argues, the question arises whether Grayson timely filed his constitutional claim within the two-year statute of limitations applicable to § 1983 actions. In its answer to Grayson's § 1983 complaint and its motion to dismiss, the State raised a statute-of-limitations issue. Neither the magistrate judge nor the district court addressed that issue. Because the State raises no statute-of-limitations issue in this appeal, we also do not address that issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV-02-BE-2800-S
Filed September 15, 2005

DARRELL GRAYSON,

Plaintiff,

—v.—

BILL PRYOR, *et al.*,

Defendants.

ORDER OF DISMISSAL

This matter is before the court on the Defendants' motion for a ruling on their motion to dismiss (Doc. 27, 7). After careful consideration of the Magistrate Judge's Report and Recommendation and the objections filed by the Plaintiff and response filed by the Defendants, for the reasons stated in the Memorandum Opinion filed contemporaneously, the court hereby GRANTS the motion for a ruling, and ADOPTS the Report of the Magistrate Judge. The court further ACCEPTS the recommendations of the Magistrate Judge. Therefore, the court ORDERS that the Defendants' Motion to Dismiss (Doc.

7) is GRANTED and this action is hereby DISMISSED for failure to state a claim upon which relief can be granted.

DONE and ORDERED this 15th day of September, 2005.

/s/ KARON O. BOWDRE

KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV-02-BE-2800-S
Filed September 15, 2005

DARRELL GRAYSON,

Plaintiff,

—v.—

BILL PRYOR, *et al.*,

Defendants.

MEMORANDUM OPINION

This matter is before the court on the motion by the Defendants requesting ruling on the Motion to Dismiss (Doc. 27, 7). The motion for a ruling is GRANTED. For the reasons stated below and in the Report and Recommendation (Doc. 14), the motion to dismiss is GRANTED and this matter is DISMISSED for failure to state a claim for which relief can be granted.

The procedural posture of the motion to dismiss is tortured. On December 10, 2002, the Defendants filed a motion to dismiss (Doc. 7), which was referred to the magistrate judge for a report and recommendation upon

briefing by both sides. On June 16, 2003, Magistrate Judge Davis issued his Report and Recommendation (Doc. 14), to which no timely objections were filed. Consequently, on July 23, 2003, after reviewing the submissions of the parties, the court entered an order adopting the Report and Recommendation and dismissing the case for failure to state a claim upon which relief can be granted. (Doc. 15).

Thereafter, the Plaintiff filed a post-hoc motion to enlarge time for filing objections, (Doe. 16), which the magistrate judge denied (Doc. 17). Plaintiff filed an objection to the denial of the motion to enlarge time (Doc. 19). On August 20, 2003, this court granted in part the Plaintiff's motion for additional time, and vacated its order dismissing the case (Doc. 21). In that order, the court gave the Defendants fifteen days in which to respond to the Plaintiff's objections, and later extend that time (Doc. 22, 23). The Defendants filed their response on October 3, 2003 (Doc. 24). Without leave of court, the Plaintiff filed a response to the Defendants' response on October 17, 2003 (doc. 25) and submitted an affidavit from Dr. Edward Blake on October 21, 2003 (doc. 26). The case then languished in the clerk's office with no attention paid to it until the Defendants filed a motion on January 25, 2005 for a ruling on their motion to dismiss (Doc. 27), to which the Plaintiff filed a reply (Doc. 28). Because the court was embroiled in a six month trial, no action was taken on the motion until it was recently brought to the court's attention.

The court has now reviewed the submissions filed by the parties originally and in response to the Magistrate's Report and Recommendation, and the Report itself. The court agrees with the Report and Recommendation that under the facts before the court as stated in the complaint, the complaint fails to state a claim upon which

relief can be granted. Therefore, the court adopts the Report and Recommendation and grants the motion to dismiss.

The court specifically finds that the Plaintiff, given repeated opportunities to do so, has not cited any legal authority that he has a constitutional right to DNA evidence when that evidence would not prove his innocence. Instead of citing legal authority, the Plaintiff relies on anecdotal reports of convictions overturned based on DNA evidence. Without legal precedent, the court will not expand or create "rights." Plaintiff's argument that the DNA testing would exonerate him is flawed because at best it could only prove that he did not rape the victim—not that he did not kill her as charged. The Plaintiff in his trial testimony admitted that he raped the victim, and other physical evidence established his guilt for murder during a robbery. The court agrees with Magistrate Davis that "the appropriate circumstances are not presented here" to recognize a § 1983 claim for access to biological evidence.

Therefore, the court will enter a separate order adopting the Report and Recommendation, granting the motion to dismiss and dismissing the Plaintiff's complaint.

DONE and ORDERED this 15th day of September 2005.

/s/ KARON O. BOWDRE

KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CASE NO. CV02-BE-2800-S
FILED June 13, 2003
ENTERED June 16, 2003

DARRELL GRAYSON,

Plaintiff

—VS.—

BILL PRYOR, *et al.*,

Defendants

REPORT AND RECOMMENDATION

The above-entitled civil action is before the court on the Motion to Dismiss filed by defendants [Doc. #7]. Plaintiff, Darrell Grayson, has filed this action pursuant to 42 U.S.C. § 1983, seeking access to biological evidence from plaintiff's state court criminal case in order to subject the evidence to DNA testing. Defendants contend the action should be dismissed pursuant to Rule 12(b)(6), Fed.R.Civ.P., for failure to state a claim on which relief can be granted.

Plaintiff, Darrell Grayson, was convicted of capital murder on June 3, 1982, in the Circuit Court of Shelby

County, Alabama, and sentenced to death. He was found guilty of raping and murdering Annie Laura Orr, an 86-year-old woman. A quantity of physical evidence was found at the crime scene, including blood, semen and hair. Plaintiff admitted to being present at the crime scene but stated he did not recall most of the incident due to severe intoxication.[1] However, he also admitted during his trial testimony, on direct and on cross-examination, to raping the victim at least once. *See Grayson v. Thompson*, 257 F.3d 1194, 1203-04 (11th Cir. 2001). The expert testimony of the State's forensic serologist, Kevin Noppinger, linked plaintiff with the rape and murder. The victim and Grayson's co-defendant both had Type O blood, while Grayson is Type B. A blood and semen stain on the victim's nightgown was determined to have come from someone with Type B blood. DNA testing was not available at the time of plaintiff's trial. Plaintiff now contends that Mr. Noppinger's testimony was incorrect and that his test results would have excluded plaintiff as the source of the semen stain on the victim's clothing. The State has refused to provide the evidence to plaintiff at his request.

In his complaint, plaintiff names as defendants Bill Pryor, Attorney General of the State of Alabama; Robert E. Owens, Jr., Shelby County District Attorney; and the Shelby County District Attorney's Office. He asserts causes of action for violation of due process of law, cruel and unusual punishment, violation of the rights of confrontation and compulsory process, and violation of the right of access to the courts and to petition for clemency. Plaintiff asks the State to release to him all biological evidence collected in connection with the rape

---

[1] Plaintiff now claims to have no recollection at all of the events of that night. *See* Exh. F to Complaint [Doc. #1], Affidavit of Darryl Grayson.

for which plaintiff was convicted so that the evidence may be transferred to Dr. Edward Blake at Forensic Science Associates for Short Tandem Repeat DNA testing.

Plaintiff already has attempted to gain access to the evidence through the state court. On September 23, 2002, Grayson filed in the Circuit Court of Shelby County and served on Robert Owens a Motion to Obtain Evidence in Possession of the District Attorney of Shelby County, Alabama. The State of Alabama, through Attorney General Bill Pryor, filed an objection to the motion. As grounds, the State argued that the circuit court did not have jurisdiction over the motion, that the motion could be construed as a Rule 32 petition but would be subject to dismissal as successive and time-barred, and that Grayson never had contested the fact that he raped the victim. It also was argued that Grayson never sought DNA testing before, during Rule 32 proceedings, despite the availability of such testing in the early 1990s. On October 10, 2002, the Shelby County Circuit Court denied the Motion to Obtain Evidence on the grounds that it lacked jurisdiction.

In their motion to dismiss, defendants deny that they have refused to turn over DNA evidence pursuant to a properly filed motion in a court of competent jurisdiction and assert Eleventh Amendment and prosecutorial immunity. They also contend plaintiff never has asserted innocence or requested DNA testing during his appeals to state and federal courts, despite the availability of DNA testing during Grayson's Rule 32 and federal habeas corpus proceedings. Defendants argue that "actual innocence" is not a constitutional claim and plaintiff's suit under § 1983 is nothing more than a way to avoid the successive petition rule applicable in habeas corpus cases. *See* 28 U.S.C. § 2244. Defendants also

plead the two-year statute of limitations for § 1983 actions as a bar to plaintiff's complaint.

The Eleventh Circuit Court of Appeals considered a similar situation in *Bradley v. Pryor,* 305 F.3d 1287 (11th Cir. 2002). Danny Joe Bradley was convicted of capital murder and sentenced to death in 1983. His conviction and sentence were affirmed through state and federal court appeals. In June 2001, Bradley filed a § 1983 action to secure production of physical and biological evidence gathered during the investigation and prosecution of Bradley, to conduct DNA testing. The district court dismissed the suit on the basis that it was the functional equivalent of a second habeas corpus petition, but it was barred from consideration.

In reversing the district court, the appellate court rejected the contention that the § 1983 suit was nothing more than an invalid attempt to undermine the validity of his conviction. Success in obtaining evidence for testing, with the possibility of a later habeas corpus petition challenging the conviction, is not the equivalent of demonstrating the invalidity of the conviction. *Id.* at 1290-91. However, the special concurrences to the Eleventh Circuit's opinion show that not all potential issues were resolved. Specifically, Judge Edmondson "hint[ed] at no view about whether Bradley's lawsuit actually states a claim upon which relief can be granted" and Judge Birch expressed his inclination to affirm the district court based on his tentative conclusion that Bradley "does not enjoy a substantive or procedural due process right to the relief he seeks." *Id.* at 1292. However, Judge Birch further stated that

> before a final conclusion should be reached on this unsettled issue, a substantially greater amount of thought and briefing should be pursued: just what rights, if any, does a convicted petitioner, who has

> exhausted his direct appeals and post-conviction avenues of relief, enjoy relative to discovery and testing of DNA evidence? Perhaps on remand this issue will receive the added scrutiny that it deserves.

Id. While the *Bradley* case has been remanded, no further opinion has been issued by the district court. *Bradley* is distinguishable from Grayson's case in that Grayson has admitted on the stand at his trial to raping the victim, but Bradley never made any admission of guilt.

The Fourth Circuit Court of Appeals has held that access to evidence for DNA testing is properly sought in a habeas corpus proceeding rather than in a § 1983 suit. *See Harvey v. Horan,* 278 F.3d 370, 375 (4th Cir. 2002). However, the Eleventh Circuit specifically rejected the holding in *Harvey* in its opinion in *Bradley.* In *Kutzner v. Montgomery County,* 303 F.3d 339 (5th Cir. 2002), the Fifth Circuit considered the § 1983 action of a defendant convicted of capital murder who sought access to biological evidence for DNA testing and claimed the officials of Montgomery County, Texas, prevented him from gaining access to exculpatory evidence which could exclude him as a perpetrator. The Fifth Circuit held that the allegations necessarily implied the invalidity of his conviction and followed the lead of the Fourth Circuit in concluding the claims were cognizable only in habeas corpus.

A different result was reached in *Godschalk v. Montgomery County District Attorney,* 177 F.Supp.2d 366 (E.D.Pa. 2001). A defendant who had been convicted of two rapes based on his confessions (and the identification by one victim) filed a petition in the state court for access to biological evidence for DNA testing. The state court denied the petition based on the confessions, which

previously had been challenged by the defendant but found voluntary and admissible. The state court said the confessions constituted overwhelming evidence of guilt, negating any need to revisit the biological evidence. Godschalk then filed a § 1983 action in federal court.

In his § 1983 complaint, Godschalk asserted the refusal to release the evidence to him deprived him of due process of law, deprived him of the opportunity to make a conclusive showing of innocence in violation of the Due Process and Cruel and Unusual Punishment Clauses, violated the Confrontation and Compulsory Process Clauses of the Sixth Amendment, deprived him of access to the courts in violation of his due process and equal protection rights, and deprived him of the right to apply for executive clemency. The district court held that despite the valid confessions and possible lack of sufficient material for testing, the plaintiff had a due process right to access to the evidence for DNA testing.

In *Boyle v. Mayer,* 46 Fed.Appx. 340, 2002 WL 31085186 (6th Cir. Sept. 17, 2002), a defendant convicted of aggravated murder filed a § 1983 action alleging the prosecutor would not cooperate in his efforts to have DNA testing performed on a blood sample. He contended the prosecutor violated his right to due process, subjected him to cruel and unusual punishment, and denied him the right to present evidence regarding his innocence. The Sixth Circuit affirmed the dismissal of the § 1983 action on the ground that no cognizable civil rights claim had been alleged. It found the defendant's exclusive remedy was a federal habeas corpus petition because he was challenging the validity of his criminal conviction or the fact or duration of his continued confinement. While the defendant argued that he had no available remedy other than a § 1983 action, the Sixth Circuit said that the applicability of *Heck v. Humphrey,*

512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), was not affected by the unavailability of habeas relief, citing a Sixth Circuit case. It further stated:

> We also note that Boyle has not raised a cognizable issue under § 1983 insofar as his claims do not implicate the validity of his convictions, as such claims would not rise to the level of a constitutional violation. *See Baker v, McCollan,* 443 U.S. 137, 142-47, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). . . .

46 Fed. Appx. at 340-41. In *Baker v. McCollan,* the Supreme Court stated, "a public official is liable under § 1983 only if he causes the plaintiff to be subjected to deprivation of his constitutional rights." 443 U.S. at 142, 99 S.Ct. at 2693.

Title 42 U.S.C. § 1983 provides a cause of action for any citizen of the United States who has been deprived by a state actor of any rights, privileges, or immunities secured by the Constitution and laws. A plaintiff must identify the provision of the Constitution which allegedly has been violated. In this case, Grayson alleges that defendants have violated his right to due process of law by preventing him from gaining access to "exculpatory" evidence, deprived him of his opportunity to make a conclusive showing of innocence in violation of the Due Process Clause of the Fourteenth Amendment, subjected him to cruel and unusual punishment in violation of the Eighth Amendment, deprived him of his Sixth Amendment rights to confrontation and compulsory process, deprived him of his right of access to the courts in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and deprived him of the opportunity to apply for executive clemency.

Due Process Right to Exculpatory Evidence

In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), the Supreme Court held that due process requires the prosecution to disclose evidence favorable to an accused upon his request when such evidence is material to guilt or punishment. The Court stated that "suppression . . . of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution." 373 U.S. at 87, 83 S.Ct. at 1196.

Brady is implicated only when the evidence is "material." This has been held to mean the applicable standard of materiality should focus on whether presentation of the evidence would create "a reasonable doubt of guilt that would not otherwise exist." *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 2402, 49 L.Ed.2d 342 (1976). As the Supreme Court observed in *Agurs*, the context in which *Brady* claims are generally raised "involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." *Id.* at 103, 96 S.Ct. at 2397. No denial of due process occurs "unless the omission deprived the defendant of a fair trial . . ." *Id.* at 108, 96 S.Ct. at 2399.

Evidence is "material" if there is a reasonable probability that disclosure of the evidence would have changed the outcome of the proceeding. *United States v. Bagley*, 473 U.S. 667, 676-77, 105 S. Ct. 3375, 3380-81, 87 L.Ed.2d 481 (1985) (plurality opinion). While this standard is not satisfied by "[t]he mere possibility that . . . undisclosed information might have helped the defense, or might have affected the outcome of the trial," *Agurs*, 427 U.S. at 109-10, 96 S.Ct. at 2400, neither does it require a showing that, more likely than not, disclosure of the suppressed evidence would have resulted in

an acquittal. *Kyles v. Whitley,* 514 U.S. 419, 434, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995). The question is whether, in the absence of the suppressed evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* Therefore, the defendant must show that the withheld evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435, 115 S.Ct. at 1566.

In Grayson's case, there has been no due process violation under *Brady.* Because Grayson admitted on the stand at trial to raping the victim, the biological evidence would not create "a reasonable doubt of guilt that would not otherwise exist." He cannot show that the evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." It is conceded that, under the holding in *Godschalk,* Grayson's out-of-court confessions might not foreclose further inquiry, even though the confessions were held to be valid and admissible after challenge. However, it is not the confessions or physical evidence alone linking Grayson with the crime. Instead, Grayson testified under oath in open court that he committed the crime. Therefore, the biological evidence is not "material" and denial of access to the biological evidence does not rise to the level of a due process violation.

Due Process Right to Show Innocence

Federal habeas corpus jurisprudence has treated claims of actual innocence "not as an independent constitutional claim, but as a basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits, even though his habeas petition would otherwise be regarded as successive or abusive." *Herrera v. Collins,* 506 U.S. 390, 416, 113 S.Ct.

853, 869, 122 L.Ed.2d 203 (1993). The Court in *Herrera* noted that the traditional remedy for claims of innocence based on new evidence has been executive clemency. *Id.* While noting that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, the Court further stated that the threshold showing to establish such a claim would necessarily be extraordinarily high. *Id.* at 417, 113 S.Ct. at 869.

The connection between actual innocence and a constitutional claim was considered again in *Schlup v. Delo,* 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Quoting *Herrera,* the Court stated, "Schlup's claim of innocence is thus 'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.' *Herrera,* 506 U.S. at 404, 113 S.Ct. at 862; *see also* 11 F.3d at 740." 513 U.S. at 315, 115 S.Ct. at 861.

Based on *Herrera and Schlup*, the undersigned finds that plaintiff has not stated a constitutional claim of "actual innocence." In Grayson's case, he cannot make the persuasive showing of actual innocence even if he were given the biological evidence because the uncontroverted evidence, from petitioner's own trial testimony, is that he committed the rape.

Cruel and Unusual Punishment

The Eighth Amendment prohibits the infliction of cruel and unusual punishment. It limits the kinds of punishment that can be imposed on a person convicted of a crime, proscribes punishment grossly disproportionate to the severity of the crime, and imposes substantive limits on what can be deemed criminal and punished as such. *Ingraham v. Wright,* 430 U.S. 651, 668, 97 S.Ct.

1401, 1410, 51 L.Ed.2d 711 (1977). "The primary purpose of (the Cruel and Unusual Punishments Clause) has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes . . . ." *Powell v. Texas,* 392 U.S. 514, 531-32, 88 S.Ct. 2145, 2154, 20 L.Ed.2d 1254 (1968) (plurality opinion).

Presumably, plaintiff is arguing that it is cruel and unusual punishment to subject him to a sentence of death if there is evidence that might exonerate him. However, in light of plaintiff's confession on the stand at his trial that he raped Ms. Orr, no purpose would be served in allowing DNA testing of the blood and semen found on her nightgown. Plaintiff is not being subjected to cruel and unusual punishment. To the extent he is challenging the constitutionality of the death penalty in his case, that is a claim that could have been raised in his appeal and post-conviction proceedings and will not be considered here.

Sixth Amendment Right to Confrontation and Compulsory Process

The Sixth Amendment provides that an accused defendant shall have, *inter alia,* compulsory process for obtaining witnesses in his favor and the right to be confronted with the witnesses against him. Generally, a defendant has a right to the government's assistance in securing favorable witnesses at trial and to put forward evidence that might influence the determination of guilt or innocence. *See Pennsylvania v. Ritchie,* 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). In order to obtain the witnesses or evidence, the defendant must demonstrate some colorable need for the evidence or testimony. *See Ross v. Estelle,* 694 F.2d 1008, 1011 (5th Cir. 1983); *Hoskins v. Wainwright,* 440 F.2d 69, 71 (5th Cir. 1971).

In Grayson's case, he had ample opportunity during his Rule 32 and federal habeas corpus proceedings to assert innocence and seek DNA testing of the physical evidence. However, he did not do so. His own failure to test the evidence when he could have and should have done so leads to the conclusion that he has not been denied the right to compulsory process or confrontation by any action of the defendants herein. Further, because Grayson admitted at trial to having raped the victim, the evidence he now seeks to obtain would not influence the determination of guilt or innocence, and he has not made a showing of some colorable need for that evidence.

Right of Access to Courts

There exists a constitutional right of access to the courts. *Bounds v. Smith,* 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). However, a plaintiff alleging a deprivation of that right must establish "relevant actual injury." *Lewis v. Casey,* 518 U.S. 343, 348, 351, 116 S.Ct. 2174, 2178, 2180, 135 L.Ed.2d 606 (1996). The plaintiff must establish prejudice by "demonstrat[ing] that [he has been] hindered his efforts to pursue a legal claim." *Id.* at 348, 116 S.Ct. at 2180. The history of Grayson's criminal case and subsequent challenges to his conviction and sentence makes it clear that he cannot establish "relevant actual injury" as *Lewis v. Casey* requires. He has pursued all available avenues of appeal and had opportunities long before now to seek access to the biological evidence for DNA testing, during the Rule 32 or federal habeas corpus proceedings. Further, his admission of guilt establishes that he has suffered no injury from any inability to submit the evidence to further testing. It would not change the outcome.

Right to Apply for Executive Clemency

Plaintiff argues that without access to the biological evidence for DNA testing, he will be unable to apply for executive clemency. He refers to the procedure set out in Section 124 of the Constitution of Alabama of 1901, as amended in 1939 by Amendment 38, which grants to the Governor of Alabama the power to grant reprieves and commutations to persons under a death sentence. *See Wilson v. State,* 268 Ala. 86, 105 So.2d 66 (1958); *Liddell v. State,* 287 Ala. 299, 251 So.2d 601 (1971).

Defendants state in their motion to dismiss and in their brief in reply to plaintiff's response to their motion to dismiss that plaintiff can pursue DNA testing in the context of a clemency petition to the Governor. The clemency process includes the right to request the opportunity to obtain evidence to show actual innocence, and the Governor has the authority to order such that evidence be produced. Therefore, plaintiff is not without remedy. Indeed, he has had remedies throughout the appeals process of which he has not availed himself.

Based on the foregoing, the magistrate judge RECOMMENDS that defendant's Motion to Dismiss be GRANTED and that this action be DISMISSED for failure to state a claim upon which relief can be granted. However, the recommendation is based in substantial part on Grayson's admission at trial, on direct examination and cross-examination, that he raped the victim and on his failure at any time, during appeal or other post-conviction proceedings, to assert that he was innocent of the charge. In appropriate circumstances, a plaintiff who was convicted at least in part on the basis of biological evidence, before the advent of DNA testing, may be able to state a § 1983 claim upon which relief could be granted for access to that biological evidence in order to subject it to DNA testing. The appropriate circumstances are not

presented here. The magistrate judge also does not address defendants' contentions that the statute of limitations bars this suit or that they are entitled to absolute or qualified immunity.

NOTICE OF RIGHT TO OBJECT

The parties are DIRECTED to file any objections to this Report and Recommendation within a period of fifteen (15) days from the date of entry. Any objections filed must specifically identify the findings in the magistrate judge's recommendation objected to. Frivolous, conclusive, or general objections will not be considered by the district court.

Failure to file written objections to the proposed findings and recommendations of the magistrate judge's report shall bar the party from a *de novo* determination by the district court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Nettles v. Wainwright,* 677 F.2d 404 (5th Cir. Unit B 1982). *See Stein v. Reynolds Securities, Inc.,* 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. Prichard,* 661 F.2d 1206 (11th Cir. 1981) (*en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

DONE this 13th day of June, 2003.

/s/ HARWELL G. DAVIS, III

HARWELL G. DAVIS, III
UNITED STATES MAGISTRATE JUDGE

UNITED STATES CODE ANNOTATED

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 21—CIVIL RIGHTS

SUBCHAPTER I—GENERALLY

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

UNITED STATES CODE ANNOTATED
CONSTITUTION OF THE UNITED STATES
ANNOTATED

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

Indictment No. 88/96

THE PEOPLE OF THE STATE OF NEW YORK

—v.—

DOUGLAS WARNEY,

Defendant.

DECISION & ORDER

THOMAS M. VANSTRYDONCK, J.

This matter has been brought by a written motion by the defense pursuant to Section 440.10(1)(g) of the Criminal Procedure Law to vacate the judgment of conviction and to set aside the sentence upon the grounds of the existence of newly discovered evidence, evidence the defendant claims could not have been produced by the defense at the trial of this matter even with the exercise of due diligence.

The Court has reviewed the papers filed by the defense and the reply papers filed by the District Attorney and the Court has heard the oral argument from both

the defense, by Mr. Neufeld, and the prosecution by Mr. Green.

It is important to point out here that the "newly found evidence" is not the fact that a third person's blood was found at the scene—that was known at the time of the trial by the defense and the jury. That information was made known to the defense by the prosecutor, as was his duty. Although the exact DNA match that science has now provided was not available at the time of the trial—it was clear that the blood at the scene was not Mr. Warney's nor the victim's but rather another not then identified person. This information was known by the trial attorney and the jury as well. The newly found evidence is not the fact that Mr. Warney's confession was inconsistent in many important ways with the facts developed by the police and the prosecutor's office. Those inconsistences were known by the defense and argued to the jury.

Rather the newly discovered evidence is the confession of Mr. Eldred Johnson. This confession was obtained by the prosecutor after the DNA typing led the prosecutor to Mr. Johnson as a result of a hit in the CODIS databank. Thereafter the prosecutor's office interviewed Mr. Johnson—now a convicted killer based on crimes in Utica, New York. After providing Mr. Johnson with an attorney, the prosecutor obtained a detailed confession from Mr. Johnson admitting that he, and he alone, killed Mr. Beason.

This evidence, the DNA typing and the confession of Mr. Johnson, is of such a character as to create a probability that had such evidence been received at the trial the verdict would have been favorable to the defendant.

Having reviewed the papers of both the defense and the prosecution, the Court must take this opportunity to thank Mr. Neufeld for agreeing to take on this case

together with his co-counsel Vanessa Potkin and Donald Thompson.

These matters are generally unpopular, unusually time consuming, and often quite trying and thankless, but the efforts of the attorneys in this case, and cases like it, are very important to the integrity of the criminal justice system.

The Court would also like to commend Mr. Green and his entire staff for the efforts they expended in this matter. An effort which was not driven by any statutory mandate or court order nor by following some kind of "office policy" requiring the prosecutor to protect a guilty verdict at all cost.

Rather, the motivation of the District Attorney appears to be a recognition that his office has a higher mandate than simply obtaining and defending convictions. That mandate is to assure that justice is done in every case. It is reassuring to know that in this County these decisions are being made not because they *have to be* but rather because they are the right thing to do. It, indeed, sometimes takes courage for a district attorney to do the right thing rather than the expedient thing. Our community should look to this case and be assured that the District Attorney in this County has that courage.

It is the ruling of this Court that the defendant's motion to set aside the verdict, a motion which is joined by the District Attorney, is hereby granted.

Upon further motion of the defendant, joined by the District Attorney, the indictment in this matter, Indictment No. 88/96, filed in Monroe County is hereby dismissed pursuant to CPL § 440.10(1)(g) and subsection (4) and the defendant is ordered to be released from custody.

Dated: May 16, 2006
Rochester, New York

ENTER:

/s/ HON. THOMAS M. VAN STRYDONCK

HON. THOMAS M. VAN STRYDONCK
Justice of the Supreme Court

STATE OF NEW YORK
SUPREME COURT
COUNTY OF MONROE

Ind. # 96-0088

THE PEOPLE OF THE STATE OF NEW YORK

—vs—

DOUGLAS WARNEY

Defendant.

APPEARANCES: Michael C. Green, Esq.
Monroe County District Attorney
Wendy Evans Lehmann, Esq.
Assistant District Attorney

Donald M. Thompson, Esq.
Attorney for Defendant

Peter Neufeld, Esq.,
Vanessa Potkin, Esq.
The Innocence Project
Attorneys for Defendant

DECISION AND ORDER

FRANCIS A. AFFRONTI, J.

In February, 1997, the Defendant was convicted following a jury trial, of Intentional Murder and Felony Murder, in the stabbing death of William Beason whose body was discovered on January 3, 1996 at his residence. The Judgment was affirmed by the New York State Appellate Division, Fourth Department (299 A.D.2d 956). The New York State Court of Appeals subsequently denied the Defendant's motion for leave to appeal (99 N.Y.2d 633).

The Defendant now moves pursuant to CPL Sec. 440.30(1-a) and the Due Process clause of the New York State Constitution for post-conviction DNA testing of certain biological evidence found at the crime scene. Specifically, he seeks an Order directing Short Tandem Repeat (STR) DNA testing on the victim's fingernail clippings, the murder weapon (a blood-stained knife), a blue towel that was found beneath the knife, and various tissues collected from the victim's bathroom. The Defendant maintains that such DNA testing has the potential to establish his innocence.

The People oppose the motion, arguing that it should be denied because Defendant failed to exercise due diligence in requesting the DNA testing. Additionally, the People contend that the Defendant failed to establish a "reasonable probability" that the verdict would have been different had said testing taken place and the results received in evidence at trial, as required by CPL Sec. 440.30(1-a), so as to prevail on the instant motion. In this regard, the People note that the jury convicted the Defendant despite testimony that the enzymes found on several blood-stained items recovered at the murder

scene, including the blue towel and tissue, did not match those of either Defendant or the victim.

Significant for purposes of this Court's decision, it must be stressed that the Defendant was charged as both a principal and accomplice, with the jury being properly instructed by the trial court as to same. Furthermore, it is likewise pertinent that the primary evidence against the Defendant consisted of his confession which included statements, later contradicted by him, that he, in fact, committed the murder with another. In ruling that the Defendant's conviction was not against the weight of the evidence, the Appellate Division, Fourth Department stated: "Defendant confessed to the crime and gave accurate descriptions of many details of the crime scene" (*People v. Warney*, 299 A.D.2d 956).

As stated, to succeed on the instant motion pursuant to CPL Sec. 440.30(1-a) a Defendant must establish that if the specified evidence had been subjected to DNA testing and the results then admitted into evidence, there is a reasonable probability that the verdict would have been more favorable to him (see *People v. Rispoli*, 1 A.D.3d 538; *People v. Pugh*, 288 A.D.2d 634).

Accordingly, and upon the above, the Defendant's motion must be *denied* because of his failure to demonstrate that favorable results from any DNA testing would undermine or impact the jury's verdict. Results which exclude Defendant as the source of any of the biological evidence recovered from the crime scene would not provide evidence which is significantly different from that submitted to the trial jury which convicted him. Moreover, although such evidence has the potential of identifying another participant in Mr. Beason's killing, it would not in any manner tend to disprove Defendant's guilt since it would not eliminate his presence at the victim's apartment and his involvement or culpability in the

murder (see *LaFevers v. Gibson*, 182 F3d 705, 721722 [10th Cir., 1999]; *Lyon v. Senkowski*, 109 F.Supp.2d 125, 141-142 [WDNY 2000]; *Galloway v. State*, 802 So.2d 1173 [Fla. App. 1st Dist. 2001]). The integrity of the Defendant's conviction is not dependent upon his DNA matching that which was found on the blood-stained items, because he need not have been the person who actually stabbed the victim or had physical contact with him.

The hypothesis, and more accurately, the conjecture proffered by defense counsel that DNA testing could result in a match with an individual whose DNA is on file with New York State's DNA databank is too speculative and improbable to satisfy the mandates of CPL Sec. 440.30(1-a), which must be strictly construed by this Court. The statutory "reasonable probability" criterion is a much more demanding and exact standard than a mere possibility that a different verdict could have resulted had DNA test results been received at trial (see generally, *Strickler v. Greene*, 527 U.S. 263, 291). Moreover, this Court must confine its inquiry as to whether favorable results from any DNA testing (results which exclude Defendant) would, in and of themselves, if received as evidence, constitute a meaningful change in the proof adduced at the Defendant's trial. Thus, upon the totality of the circumstances herein, it must be concluded that they would not. In addition, the Defendants Due Process claim must likewise fail for the same reasons as aforesaid.

Therefore, upon the above, it is hereby,

ORDERED, that the Defendant's motion for Post-Conviction DNA Testing is *denied* in its entirety.

The above shall constitute the *Decision* and *Order* of this Court.

Dated this 15 day of December, 2004, at Rochester, New York.

/s/ FRANCIS AFFRONTI

FRANCIS A. AFFRONTI
Supreme Court Justice

Supreme Court U.S.
FILED
DEC 1 2006
OFFICE OF THE CLERK

No. 06-709

In the
Supreme Court of the United States

DARRELL GRAYSON,
Petitioner,

v.

TROY KING, Attorney General for the State of Alabama, in his official capacity; ROBERT E. OWENS, JR., District Attorney for Shelby County, in his official capacity; SHELBY COUNTY DISTRICT ATTORNEY'S OFFICE,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION

Troy King
Attorney General

Kevin C. Newsom
Solicitor General
Counsel of Record*

J. Clayton Crenshaw
Assistant Attorney General

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401

December 1, 2006

CAPITAL CASE

QUESTION PRESENTED
(Restated)

Is there a federal constitutional right to post-conviction DNA testing in the circumstances presented, namely, where (1) the petitioning inmate has never affirmatively asserted his actual innocence; (2) the record evidence of his guilt is overwhelming; (3) the testing sought cannot conclusively prove his innocence; and (4) he waited, without explanation, until the eleventh hour to seek testing?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. Facts of the Crime 1

B. Criminal and Post-Conviction Proceedings 3

C. Section 1983 and Related Proceedings 4

1. *Prelude to the Eleventh Circuit.* 4

2. *The Eleventh Circuit's decision.* 6

REASONS FOR DENYING THE WRIT 9

I. This Court Should Deny Certiorari Because There Is No Conflict In The Circuits. 9

II. This Court Should Deny Certiorari Because The Eleventh Circuit's Decision Is Correct. 12

A. The Peculiar Circumstances Of Grayson's Case Make His Claim To Post-Conviction DNA Testing Particularly Weak. 12

1. *Grayson has never affirmatively asserted his innocence.* 12

2. *The evidence against Grayson is overwhelming.* 13

3. *DNA testing could not, even if favorable, conclusively prove Grayson's innocence.* 17

4. *Grayson inexplicably waited until the eleventh hour to seek DNA testing* 20

B. Even Setting Aside The Peculiarities Of Grayson's Case, The Eleventh Circuit's Reasoning Is Sound And Its Decision Correct. 21

1. Grayson Is Not Entitled To Testing Under *Brady v. Maryland*. 22

a. Brady *is a "fair trial" right.* 22

b. Brady *applies to evidence that is actually, not just potentially, favorable.* 25

2. Grayson Is Not Entitled To Testing Under *Matthews v. Eldridge*. 26

III. This Court Should Deny Certiorari Because Post-Conviction DNA Testing Is An Issue Uniquely Suited To Legislative Resolution. 29

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Alley v. Key, 431 F. Supp. 2d 790 (W.D. Tenn. 2006) 11

Alley v. Key, No. 06-5552, 2006 WL 1313364 (6th Cir. May 14, 2006) (unpublished), *cert. denied*, 126 S. Ct. 2973 (2006) 7, 10, 11

Apprendi v. New Jersey, 530 U.S. 466 (2000) 19

Arizona v. Youngblood, 488 U.S. 51 (1988) 10, 21

Atwater v. City of Lago Vista, 532 U.S. 318 (2001) 29

Blakely v. Washington, 542 U.S. 296 (2004) 19

Brady v. Maryland, 373 U.S. 83 (1963) ..... passim

Calderon v. Thompson, 523 U.S. 538 (1998) 8, 28

Godschalk v. Montgomery County District Attorney, 177 F. Supp. 2d 366 (E.D. Pa. 2001) 13

Grayson v. State, 479 So. 2d 69 (Ala. Crim. App. 1984), *aff'd, Ex parte Grayson*, 479 So. 2d 76 (Ala.), *cert. denied, Grayson v. Alabama*, 474 U.S. 865 (1985) 3, 4, 17

Grayson v. State, 675 So. 2d 516, 519-31 (Ala. Crim. App. 1995), *cert. denied*, 519 U.S. 934 (1996) 4

Grayson v. Thompson, 257 F.3d 1194 (11th Cir. 2001) .... passim

Harvey v. Horan, 278 F.3d 370 (4th Cir. 2002) ..... passim

Harvey v. Horan, 285 F.3d 298 (4th Cir. 2002) 13, 29, 30

Heck v. Humphrey, 512 U.S. 477 (1994) 6, 23

Herrera v. Collins, 506 U.S. 390 (1993) 18, 19

House v. Bell, 126 S. Ct. 2064 (2006) 18, 19

Imbler v. Pachtman, 424 U.S. 409 (1976) 23, 24

Knight v. Jacobson, 300 F.3d 1272 (11th Cir. 2002) 24

Kyles v. Whitley, 514 U.S. 419 (1995) 7, 23, 25

Matthews v. Eldridge, 424 U.S. 319 (1976) ..... passim

Murray v. Carrier, 477 U.S. 478 (1986) 8, 28

Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) 8, 26, 27

Pryor v. Bradley, No. 02-1237, *cert. denied*, 538 U.S. 999 (2003) 6

Ring v. Arizona, 536 U.S. 584 (2002) 19

Sawyer v. Whitley, 505 U.S. 333 (1992) 8, 28

Schlup v. Delo, 513 U.S. 298 (1995) 18

United States v. Agurs, 427 U.S. 97 (1976) 7, 22, 23, 25

United States v. Bagley, 473 U.S. 667 (1985) ..... passim

United States v. Ruiz, 536 U.S. 622 (2002) 23

Wade v. Brady, No. 04-12135-NG, 2006 WL 3051770 (D. Mass. Oct. 27, 2006) 13

Washington v. Glucksberg, 521 U.S. 702 (1997) 30

Williams v. Head, 185 F.3d 1223 (11th Cir. 1999) 20

Statutes

42 U.S.C. §1983 ..... passim

Ala. Code §13A-5-31(a)(4) (1975) 3, 17

Ala. Code §13A-5-40(a)(4) 3

Other Authorities

American Bar Association, *Standards of Criminal Justice Relating to the Prosecution Function*, http://www.abanet.org/crimjust/standards/pfunc_blk.html (Nov. 28, 2006) 24

Alabama Legislative Information System Online, Bill Status for SB28, http://alisdb.legislature.state.al.us.acas/ACASLogin/asp (Nov. 28, 2006).....30

Innocence Project, About the Innocence Project, http://www.innocenceproject.org/about/(Nov. 28, 2006).....20

Innocence Project, Case Profiles: Bruce Godschalk, http://www.innocenceproject.org/case/display_profile.php?id=102 (Nov. 28, 2006).....13

U.S. Department of Justice, *Postconviction DNA Testing: Recommendations for Handling Requests* (Sept. 1999).....20

Alabama Rules of Professional Conduct 3.8, http://alabar.org/ogc/ropc/rule3-8.htm (Nov. 28, 2006).....24

Rules

Sup. Ct. R. 10(a)-(b).....9

STATEMENT OF THE CASE

A. Facts of the Crime

Petitioner Darrell Grayson was charged with, convicted of, and sentenced to death for the brutal burglary-murder of 86-year-old widow Annie Laura Orr. The Eleventh Circuit recounted the facts of the crime as follows:

> During the evening hours of December 23rd, 1980, the Defendant Darrell Grayson, Co-defendant Victor Kennedy, and two other individuals, met at Kennedy's residence, also in Montevallo, and a short distance from that of Mrs. Orr. They drank wine and played cards. Sometime shortly after midnight, and after the other individuals had gone, Kennedy and Grayson left Kennedy's house on foot, walking in the direction of Mrs. Orr's house. They were armed with a .38 Caliber handgun, which belonged to Kennedy. They decided to burglarize Mrs. Orr's residence in order to get some money. They had previously discussed such a burglary, that Mrs. Orr was elderly, and where she kept her money.
>
> They entered the Orr house during the very early morning hours of December 24th, 1980, through a rear basement door. They then proceeded through the dirt basement, up several steps, and into the main living portion of the house near Mrs. Orr's bedroom. The Defendants used a flashlight to illuminate their way.
>
> Once inside the living portion of the house they entered Mrs. Orr's bedroom where she was apparently sleeping. They subdued and beat her, striking her in the head with a blunt instrument and breaking several of her ribs. Darrell Grayson then placed a pillowcase over her head and

> wrapped two relatively long lengths of masking tape very tightly around her head so that when they were finished he[r] head then appeared to be that of a mummy. They then proceeded to look for money and other valuables.
>
> When apparently they could not find a significant amount of cash, the[y] began threatening Mrs. Orr by beating her further, threatening to drown her, and firing two shots from Kennedy's pistol, into her bedroom block and wall. Also during their assault, they raped Mrs. Orr repeatedly. Darrell Grayson said he didn't want to rape Mrs. Orr but that he did so twice. Mrs. Orr lived through the assault of being raped, beaten, threatened, unable to see or adequately breathe, and begging her assailants not to hurt her but to take the money and leave, for a considerable period of time. She then died.

Grayson v. Thompson, 257 F.3d 1194, 1197-98 (11th Cir. 2001).

On the morning of December 24, 1980, Mrs. Orr's son discovered her dead body in her home in Montevallo, Alabama, and called law enforcement officers. *Id.* at 1198. The officers discovered a trail of playing cards leading from Mrs. Orr's home to the home of Victor Kennedy, a known burglar. *Id.* Knowing that Kennedy and Grayson had been seen together the previous night, officers began looking for Grayson on the afternoon of December 24, 1980, and discovered him "squatting in the bushes" in a wooded area near his home. *Id.* Following his arrest, Grayson confessed. *Id.* Officers also discovered Mrs. Orr's wedding rings in Grayson's wallet and obtained physical evidence from Grayson that linked Grayson to the crime. *Id.* Grayson was taken into custody. *Id.*

App. 2a-4a.

In short, Grayson "burglarized, beat, terrorized, raped, and suffocated to death a helpless 86-year-old lady." *Grayson v. State*, 479 So. 2d 69, 75 (Ala. Crim. App. 1984). The state court vividly described the crime as "more characteristic of the actions of wild ravaging dogs of hell rather than even the lowest and most depraved level of humanity." *Id.* at 75-76.

B. Criminal and Post-Conviction Proceedings

Grayson was charged with Mrs. Orr's murder, which was made capital pursuant to Ala. Code §13A-5-31(a)(4) (1975)[1] because it was committed during a burglary (the predicate for which was the intent to rob Mrs. Orr). *See* C.A. ER 24, App. A (indictment). "Grayson was not indicted for rape [or] capital rape-murder." App. 9a.

The evidence of Grayson's guilt presented at trial (described in greater detail below, *see infra* at 13-16) was, as the Eleventh Circuit reiterated, "overwhelming." App. 18a, 24a. In addition to the biological evidence that Grayson now assails (Pet. at 5-6), the trial evidence included the following: (1) Grayson's numerous statements in which he repeatedly confessed to the murder; (2) Grayson's own trial testimony, in which, while asserting that he was too drunk to recall some of the details, he again "admitted to the burglary, rape, and murder," App. 8a; and (3) physical evidence in the form of (a) Mrs. Orr's wedding rings, which police found in Grayson's wallet, *see id.*, (b) a shirt that police found hidden under a rock near Grayson's home and that "had spattered human blood on it, of a type consistent with that of the victim, Mrs. Orr," C.A. ER App. B, p.200 (sentencing order), and (c) a hair in Grayson's sock that, while not conclusive, was "consistent with the victim's head hair and inconsistent with Grayson's," App. 6a.

The jury convicted Grayson and then recommended that

---

[1] Currently Ala. Code §13A-5-40(a)(4).

he be sentenced to death. App. 9a. After a separate sentencing hearing, the judge accepted the jury's recommendation and sentenced Grayson to death. *Id.* Grayson's conviction and sentence were affirmed on direct appeal, and this Court denied certiorari. *See Grayson v. State*, 479 So. 2d 69 (Ala. Crim. App. 1984), *aff'd, Ex parte Grayson*, 479 So. 2d 76 (Ala.), *cert. denied, Grayson v. Alabama*, 474 U.S. 865 (1985).

Grayson filed a petition for post-conviction relief in state court in January 1986. Thereafter, in September 1990, Grayson filed an amended state post-conviction petition. Grayson subsequently amended that petition three times – in August 1991, in January 1992, and again in March 1992. *Grayson*, 257 F.3d at 1208. In his state post-conviction petitions, Grayson presented a laundry list of claims (47, by our count) alleging all manner things – that his counsel were ineffective, that his confessions were involuntary, that there was insufficient evidence, that he was denied expert mental-health assistance, etc. After conducting a two-day hearing, the trial court denied relief; the Alabama Court of Criminal Appeals affirmed, and this Court again denied certiorari. *Grayson v. State*, 675 So. 2d 516, 519-31 (Ala. Crim. App. 1995), *cert. denied*, 519 U.S. 934 (1996). *Not once during the nearly 10 years that his state post-conviction proceedings were pending did Grayson seek DNA testing of any biological evidence.*

In April 1996, Grayson filed a federal habeas petition. In it, he raised some 46 claims – among them, that his lawyers were ineffective, that his confessions were involuntary, and that he was denied funds to hire a forensic pathologist. The district court denied relief, the Eleventh Circuit affirmed, *Grayson*, 257 F.3d at 1215-32, and this Court once again denied certiorari, 536 U.S. 964 (2002). *Not once during the 5-plus years that his federal habeas proceedings were pending did Grayson seek DNA testing of any biological evidence.*

C. Section 1983 and Related Proceedings

1. ***Prelude to the Eleventh Circuit.*** On August 12, 2002, after state and federal post-conviction proceedings had run their course, the State moved the Alabama Supreme Court to set an execution date. Presumably in response to the State's

motion - and for the first time in any court - Grayson on September 23, 2002 filed in state court a request to subject certain items of physical evidence to DNA testing. After the state court denied his motion, Grayson went to federal court, and on November 15, 2002 filed the present §1983 action seeking an order requiring DNA testing. ER 1 (complaint). Only then, on March 27, 2003, did Grayson lodge an "opposition" to the State's motion to set an execution date - asserting as the basis for his opposition the existence of his DNA-based §1983 action in federal court. In his opposition, Grayson effectively asked the Alabama Supreme Court to stay his execution pending final resolution of this §1983 suit. *See* Opposition to State's Motion To Set Execution Date at 2, *Ex parte Grayson*, No. 1830756 (Mar. 27, 2003) ("Mr. Grayson respectfully requests that this Court withhold a ruling on the State's motion until the disposition of pending litigation.").

The State responded that if Grayson thought that his §1983 action in federal court necessitated a stay, "he [could] seek such relief from that court." State's Response to Grayson's Opposition at 10, *Ex parte Grayson*, No. 1830756 (Apr. 30, 2003). But to no avail. Over three dissents, the Alabama Supreme Court denied the State's motion to set an execution date - effectively staying Grayson's execution - "pending a ruling on the motion for DNA testing ...." Order, *Ex parte Grayson*, No. 1830756 (May 22, 2003).[2]

Back in federal court, the magistrate judge on June 16, 2003 filed a report recommending that Grayson's §1983 suit for DNA testing be dismissed for failure to state a claim. He noted that while "[i]n appropriate circumstances" a condemned inmate might be able to make out a §1983 claim for post-conviction DNA testing (App. 45a), Grayson himself could not, particularly given that he had "testified under oath in open court that he committed" the murder (App.

---

[2] This context sheds important light on Grayson's assertion that this litigation has proceeded "deliberately" because "[t]he State has yet to set an execution date ...." Pet. at 22.

41a). In an opinion filed September 15, 2005, the district court adopted the magistrate judge's recommendation and dismissed Grayson's complaint. The district court emphasized that Grayson, "given repeated opportunities to do so, ha[d] not cited any legal authority that he has a constitutional right to DNA evidence when that evidence would not prove his innocence." App. 32a. The court found that Grayson's "argument that the DNA testing would exonerate him [was] flawed because at best it could only prove that he did not rape the victim - not that he did not kill her as charged," *i.e.*, during the commission of a burglary. *Id.*

2. ***The Eleventh Circuit's decision.*** The Eleventh Circuit unanimously affirmed. After reiterating circuit precedent that "claims seeking post-conviction access to biological evidence for DNA testing purposes may be brought as a §1983 action" rather than a habeas petition (App. 14a),[3] the Eleventh Circuit turned to address Grayson's contention that there is a federal constitutional right to post-conviction DNA testing under either *Brady v. Maryland*, 373 U.S. 83 (1963), or *Matthews v. Eldridge*, 424 U.S. 319 (1976).

The Eleventh Circuit first rejected Grayson's *Brady* argument. Citing numerous decisions of this Court for support, the court of appeals observed that "[t]he *Brady* rule is grounded in a defendant's right to a fair trial." App. 15a. Quoting *United States v. Bagley*, 473 U.S. 667, 675-76 (1985), the Eleventh Circuit reiterated that "'unless the omission [*i.e.*, the alleged failure to disclose] deprived the defendant

---

[3] The State has in the past disputed the cognizability of DNA-testing requests under §1983 as a general matter, *see* Pet. for Certiorari, *Pryor v. Bradley*, No. 02-1237, *cert. denied*, 538 U.S. 999 (2003), and challenged in this case the cognizability of Grayson's specific testing request, which is predicated on an assertion that the State's serology expert offered false testimony at trial, *see* State C.A. Br. 52-57. (As to the substance of the charge, see the Eleventh Circuit's explanation, App. 7a n.2.) The point is that, to the extent that Grayson's testing request rests on an underlying allegation that the State's serologist testified "false[ly]" or "fraudulent[ly]" (Pet. at 4, 6), it "necessarily impl[ies] the invalidity of" his conviction and thus triggers the bar of *Heck v. Humphrey*, 512 U.S. 477, 487 (1994).

of a fair trial, there was no constitutional violation requiring that the verdict be set aside.'" App. 15a (also citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), and *United States v. Agurs*, 427 U.S. 97, 108 (1976), as requiring denial of a "fair trial" as a predicate to a *Brady* claim). Because *Brady* doctrine concerns "the suppression of evidence prior to and during trial that was material to the proceedings and denied the defendant a fair trial," because Grayson "makes no argument that the biological evidence was suppressed at trial," and because "it is beyond peradventure that Grayson received a fair trial," the *Brady* line of cases, the Eleventh Circuit concluded, is simply irrelevant. App. 16a.

Continuing, the Eleventh Circuit held that neither *Imbler v. Pachtman*, 424 U.S. 409 (1976), nor *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), supports extending *Brady*'s disclosure rule beyond a defendant's trial and conviction. The former, by its own terms, speaks only of a prosecutor's "ethical obligations," not his §1983-enforceable constitutional obligations (App. 16a), and the latter "pertained to a request for files during [an] ongoing prosecution" (App. 16a-17a). Put simply, the Eleventh Circuit determined that there is no support in this Court's precedent "for the proposition that *Brady*'s constitutional rule – *i.e.*, the state's disclosure obligation – extends beyond a defendant's conviction." App. 16a.

Finally with respect to *Brady*, the Eleventh Circuit emphasized that the only other federal appellate courts to address a claim like Grayson's – *i.e.*, that there is a due process right to post-conviction DNA testing – have rejected it. Specifically, the Eleventh Circuit pointed to *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002), and *Alley v. Key*, No. 06-5552, 2006 WL 1313364 (6th Cir. May 14, 2006) (unpublished), in which the Fourth and Sixth Circuits, respectively, rejected the contention that *Brady*'s disclosure obligation extends beyond a defendant's trial so as to support a claim for post-conviction DNA testing. App. 18a-19a & n.7.

Having dispensed with Grayson's *Brady* argument, the Eleventh Circuit addressed *Matthews*' three-part balancing test. Noting the division among the members of this Court

in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), the court below questioned whether a *Matthews*-style analysis was even appropriate to someone, like Grayson, who has been duly convicted and sentenced to death. App. 23a-24a. For purposes of analysis, however, the court "assum[ed] *arguendo* that Grayson ha[d] some residual, continuing liberty interest under the due process clause and that the *Matthews* test applies to deprivation of that interest." App. 24a. Even granting that assumption, the Eleventh Circuit held that "the second and third *Matthews* factors overwhelm [Grayson's] alleged private interest." *Id.*

The court concluded that the second factor – the risk of erroneous deprivation and the utility of additional process – "weigh[ed] heavily against Grayson's claim" for two reasons: first, because Grayson's "interest in his life was already litigated extensively for twenty years," *i.e.*, through trial, direct appeal, and state and federal post-conviction proceedings; and second, because the DNA testing sought by Grayson (of semen stains on Mrs. Orr's nightgown and bed sheet, *see* Pet. at 12) pertains only to the question whether Grayson raped Mrs. Orr, "and could not exculpate Grayson of the capital murder during a burglary – the only crime of conviction," for which the uncontested evidence of Grayson's guilt "was and is overwhelming." *Id.* "Accordingly," the Eleventh Circuit held, "the risk of an erroneous deprivation of Grayson's alleged liberty interest is low, and the probable value of Grayson's post-conviction access to the evidence is slight." App. 25a.

As to the third factor – the gravity of the State's interest – the Eleventh Circuit, citing decisions of this Court for support, found that "the government has a strong interest in the finality of duly adjudicated criminal judgments." *Id.* (citing *Calderon v. Thompson*, 523 U.S. 538, 555 (1998), *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992), and *Murray v. Carrier*, 477 U.S. 478, 487 (1986)). Particularly given that Grayson "enjoyed extensive judicial process over the years since his conviction," the court concluded that the interests in "guarding against a flood of requests, protecting the finality of convic-

tions, and ensuring closure for victims and survivors" counseled against Grayson's eleventh-hour testing request. *Id.*

In closing, the Eleventh Circuit noted that it did not need to "decide whether there can *ever* be a post-conviction right of access to the type of biological evidence Grayson seeks for DNA testing." App. 26a. Instead, the court "simply conclude[d] that under the particular circumstances of this case, Grayson cannot show such an entitlement." *Id.*

REASONS FOR DENYING THE WRIT

I. This Court Should Deny Certiorari Because There Is No Conflict In The Circuits.

The chief reason for granting certiorari, of course, is to resolve a conflict among the United States courts of appeals or state courts of last resort. *See* Sup. Ct. R. 10(a)-(b). Here, there is no such conflict. Tellingly, the most Grayson can bring himself to say is that "[v]arious federal and state courts have spoken on the question presented by this petition" and (opaquely) that "jurists are looking to this Court to settle the question." Pet. at 21. To the extent that Grayson means to suggest that there is a genuine conflict that warrants this Court's attention, he is simply wrong. In fact, every appellate court that has squarely considered the question has rejected the very arguments that Grayson makes here and has held that there is no federal constitutional right to post-conviction DNA testing.

In *Harvey v. Horan*, a convicted rapist sought "a constitutional right of access to DNA evidence under 42 U.S.C. §1983." 278 F.3d 370, 372 (4th Cir. 2002). In an opinion authored by then-Chief Judge Wilkinson, the Fourth Circuit refused the claim and declined to "fashion a substantive right to post-conviction DNA testing out of whole cloth or the vague contours of the Due Process Clause." *Id.* at 375. Particularly relevant for present purposes, the Fourth Circuit expressly rejected the two arguments that Grayson featured below and reiterates in his petition here – namely, that a substantive right to post-conviction DNA testing arises un-

der either (1) *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, *see* 278 F.3d at 378-79; or (2) the *Matthews v. Eldridge*, 424 U.S. 319, three-part balancing test, *see* 278 F.3d at 377. (The Fourth Circuit likewise rejected the rapist-plaintiff's reliance on *Arizona v. Youngblood*, 488 U.S. 51 (1988). *See* 278 F.3d at 380 n.3; *see also id.* at 386-87 (King, J., concurring). Grayson invoked *Youngblood* in the Eleventh Circuit, *see* App. 17a-18a n.6, but seems to have abandoned it here, *see* Pet. at vi-vii (Table of Authorities).) In deciding the case as it did, the Fourth Circuit expressed specific concern that "[e]stablishing a constitutional due process right under §1983 to retest evidence with each forward step in forensic science would leave perfectly valid judgments in a perpetually unsettled state." 278 F.3d at 376. Further, observing that "[t]his is not an area in which legislatures have been inactive," the Fourth Circuit worried that by minting a new constitutional right it would "improperly short-circuit legislative activity by allowing judges, rather than legislatures, to determine the contours of the right." *Id.*

More recently, the Sixth Circuit, in an unpublished opinion authored by Chief Judge Boggs, agreed that (at least in the circumstances presented) "there exists no general constitutional right to post-conviction DNA testing." *Alley v. Key*, No. 06-5552, 2006 WL 1313364, at *1 (6th Cir. May 14, 2006). The Sixth Circuit's decision is particularly relevant here for three reasons. First, the circumstances in which Alley's case arose are essentially identical to those surrounding Grayson's: (1) "Alley confessed to most features of the brutal attack" for which he was convicted and sentenced to death; (2) "[h]e never asserted his innocence either at trial or until very lately in the nineteen years since his conviction"; and (3) he filed his DNA-testing request "as part of a last-minute claim of actual innocence." *Id.* Second, the Sixth Circuit rejected the very arguments that Grayson presses here: (1) there is "no procedural due process right to post-conviction DNA testing"; (2) there is "no substantive due process right" to such testing; (3) "[n]or does *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), demand" testing. *Alley*, 2006 WL

1313364, at *2. And finally, it is pertinent for present purposes because this Court denied certiorari. *See Alley v. Key*, 126 S. Ct. 2973 (2006).

The Eleventh Circuit's decision here is perfectly consistent with - and, as noted above, expressly cites for support - the Fourth and Sixth Circuit's decisions. With respect to the Fourth Circuit's decision in Harvey, the court below observed: "The only circuit court to address this issue in a published opinion is the Fourth Circuit in *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002). In that case, the Fourth Circuit rejected plaintiff Harvey's due process claim for post-conviction access to biological evidence against him for DNA testing. *Id.* at 376-77." App. 18a-19a (footnote omitted). As to the Sixth Circuit's decision in *Alley*:

> In an unpublished opinion, the Sixth Circuit affirmed the district court's ruling in *Alley v. Key*, 431 F.Supp.2d 790 (W.D. Tenn. 2006), that the petitioner, a death-row inmate, had no post-conviction constitutional right to biological evidence used against him at trial for purposes of DNA testing, and affirmed the resulting dismissal of the petitioner's §1983 complaint. *Alley v. Key*, No. 06-5552, 2006 WL 1313364 (6th Cir. May 14, 2006) (unpublished), *cert. denied*, 126 S. Ct. 2973 (2006). The Sixth Circuit noted that "there exists no general constitutional right to post-judgment DNA testing," and specifically rejected essentially the same due process and *Brady* claims asserted by Grayson here. *Id.* at *1-2.

App. 18a-19a n.7.

There is, therefore, no circuit split that requires this Court's attention. To the contrary, the circuits are lining up behind the position embraced by the Eleventh Circuit here. In the light of the current unanimity in the circuits, Grayson's report that as of the filing of his petition, "at least six other cases that raise virtually the same question were percolating in the lower federal courts" works against him. Pet. at 21 (citing cases pending in the Second, Seventh, and Ninth

Circuits, as well as in district courts in Massachusetts and Alabama). This Court should allow the DNA-testing issue to "percolat[e]." If, by chance, the First, Second, Seventh, or Ninth Circuit were to go on record disagreeing with the currently prevailing view embraced by the Fourth, Sixth, and Eleventh Circuits, then - but only then - would this Court have a genuine conflict to address. Until that time, there simply is no exigency requiring this Court's review.

II. This Court Should Deny Certiorari Because The Eleventh Circuit's Decision Is Correct.

In his petition, Grayson asserts that the Eleventh Circuit's decision was "wrong and contrary to this Court's precedents." Pet. at 20. He is incorrect. Particularly given the specific circumstances of Grayson's case, the Eleventh Circuit's decision here was plainly the right one.

A. The Peculiar Circumstances Of Grayson's Case Make His Claim To Post-Conviction DNA Testing Particularly Weak.

This case arises, of course, against a particular backdrop. Before explaining the substantive failure of Grayson's arguments, it is worth emphasizing several considerations that underscore the hollowness of Grayson's case.

1. *Grayson has never affirmatively asserted his innocence.* This is a unique case. Grayson warns in his petition that without the creation of a new federal constitutional right to post-conviction DNA testing, "a significant risk exists that an innocent man will be executed." Pet. at 11. And yet, Grayson has *never* - not at trial, not on appeal, not during state post-conviction proceedings, not on federal habeas - affirmatively asserted that he is, in fact, innocent of Mrs. Orr's murder. Indeed, even in the current round of §1983 litigation, all Grayson (having filed a fresh affidavit) can bring himself to say is that he was drunk the night of the murder, that he now "ha[s] no recollection of the crime," and that he "would like to know the truth" concerning his guilt. C.A. ER 1 Exh. F, pp.1-2. Thus, as the Eleventh Circuit emphasized, "[n]owhere" has Grayson ever "claim[ed] ac-

tual innocence." App. 12a; *see also id.* at 18a ("Even now, Grayson does not contend that he is actually innocent ...."); *id.* at 20a ("Grayson also still does not contend that he is actually innocent ...."); *id.* at 26a ("Grayson has never affirmatively proclaimed his actual, factual innocence ....").

The absence of any affirmative assertion of actual innocence here starkly distinguishes Grayson's case from those on which he principally relies. The petitioner in *Harvey v. Horan* - which, again, rejected the very claim Grayson makes here - unambiguously "claim[ed] that he [was] innocent." 278 F.3d at 375. And, indeed, even former Judge Luttig, on whose solo opinion Grayson so heavily relies,[4] would apparently have restricted any due process DNA-testing right to those who have "steadfastly maintain[ed]" and "persist[ed] in" their "absolute," "factual" innocence. *Harvey v. Horan*, 285 F.3d 298, 318, 319 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc). The inmate in *Godschalk v. Montgomery County District Attorney*, 177 F. Supp. 2d 366 (E.D. Pa. 2001),[5] likewise had consistently "maintained ... his innocence," Innocence Project, Case Profiles: Bruce Godschalk, http://www.innocenceproject.org/case/display_profile.php?id=102 (Nov. 28, 2006). So, too, the petitioner in *Wade v. Brady*, No. 04-12135-NG, 2006 WL 3051770 (D. Mass. Oct. 27, 2006),[6] "told authorities, and has maintained to this day, that he did not" commit the rape of which he was convicted. *Id.* at *3.

The point is simply that inasmuch as Grayson has *never* affirmatively asserted his actual, factual innocence of Mrs. Orr's murder, his request for DNA testing is doubly novel.

2. ***The evidence against Grayson is overwhelming.*** It is common ground here (as stated by Grayson lawyer and Innocence Project Executive Director Nina Morrison) that the

---

[4] *See* Pet. at 2, 20, 23, 25, 26.

[5] *See* Pet. at 9, 13, 23, 25-26.

[6] *See* Pet. at 20, 23, 24-25.

record evidence of Grayson's guilt is "overwhelming." C.A. ER 1, p.13; *accord* App. 18a, 24a ("overwhelming").

At trial, the State presented abundant evidence (contested biological evidence aside) to support a conviction for capital burglary-murder. *See* App. 4a-9a (summarizing evidence). A brief tour is in order. First, shortly after his arrest, Grayson admitted that he and his accomplice, Kennedy, "had been planning for a couple of weeks to rob Mrs. Orr to get money for Christmas" and that Mrs. Orr "was selected as a target because [Grayson] had worked for her and was familiar with her house and where she kept money." *Grayson*, 257 F.3d at 1199. Second, "officers recovered Mrs. Orr's wedding rings from Grayson's wallet ...." *Id.* at 1198. Third, "hidden under a rock near [Grayson's] residence," investigators discovered a bloody shirt belonging to Grayson that "had spattered human blood on it, of a type consistent with that of the victim, Mrs. Orr." C.A. ER 24 App. B, p.200 (sentencing order); *see also Grayson*, 257 F.3d at 1201. Fourth, investigators discovered a hair in Grayson's sock that was "consistent with [Mrs. Orr's] head hair." *Id.* at 1202; *see also* C.A. ER 24 App. B, p.201.

In addition, there were Grayson's numerous confessions concerning his role in the burglary-murder. *See* App. 4a-5a (recounting confessions). In his first statement (taken after two rounds of *Miranda* warnings and a written waiver), Grayson admitted that

> he had performed yard work for Mrs. Orr in the past, was familiar with her house, and had entered her home with Victor Kennedy in the early morning hours of December 24. He admitted that they had awakened Mrs. Orr and had repeatedly raped her in the course of searching the house for valuables. After taking what money and valuables they could find, Grayson and Kennedy left Mrs. Orr on her bed and left the house.

Grayson, 257 F.3d at 1199. Shortly thereafter, Grayson waived his *Miranda* rights a third time and gave another

statement in which he confirmed the details of the earlier confession but "claimed that both the burglary and the rape were Kennedy's ideas." *Id.*

Two days later, after again being advised of and waiving his *Miranda* rights, Grayson confessed a third time:

> Grayson explained that he and Kennedy had been planning for a couple of weeks to rob Mrs. Orr to get money for Christmas. Grayson said that Mrs. Orr was selected as a target because he had worked for her and was familiar with her house and where she kept money. * * * Grayson stated that Mrs. Orr had begged them not to hurt her and told them to take her money. Grayson explained that he had taped a pillowcase over Mrs. Orr's face to prevent her from recognizing him, although he stated that he did not think Mrs. Orr would recognize him since it had been years since he had worked for her. After he taped the pillow case over her head, Grayson could not understand what she was saying and that her words sounded like mumbling. He described both Kennedy and himself raping Mrs. Orr repeatedly and their unsuccessful search for money and other valuables.

Id. at 1199-1200. The state and federal courts have uniformly found that Grayson's confessions were entirely voluntary. *Id.* at 1201, 1214, 1230. What is more, as the Eleventh Circuit observed on habeas, "[d]uring the past twenty years, Grayson has never recanted his confessions." *Id.* at 1201.

Grayson also testified at trial. *See* App. 8a-9a (reviewing trial testimony). And although he sought to fine-tune his story a bit (*e.g.*, by claiming that he was too drunk to recall some of the particulars), he clearly reiterated at trial a number of details concerning his participation in the burglary-murder. Among them: (1) "Grayson admitted that he and Kennedy had been planning a robbery for at least a week and that Mrs. Orr's house was chosen because Grayson had worked for her and knew her house and where she had kept

money"; (2) "Grayson also admitted that he had wrapped a pillowcase and tape around Mrs. Orr's head" so as to "keep from being identified"; and (3) Grayson "explained that he hid the bloodstained shirt he had been wearing the night [of the murder] in the woods after recalling his involvement in the crime." *Grayson*, 257 F.3d at 1203-04. Indeed, Grayson made no effort whatsoever at trial to deny his involvement in the burglary-murder; rather, "[b]ecause Grayson had confessed to his involvement in Mrs. Orr's death," his lawyer was left to try to mitigate Grayson's intent by emphasizing his intoxication. *Id.* at 1205.

A brief word about Grayson's confessions: Grayson's petition asserts, without any support at all, that "there is substantial reason to doubt Mr. Grayson's confessions." Pet. at 17. With respect, that is just not so. The social-science sources Grayson cited in the court below emphasize the risks resulting from coercive police practices - he referred there to "interrogation-induced" and "police-induced" confessions, "poor police practice [and] overzealousness," etc. Grayson C.A. Br. 44-45. Those concerns are inapposite here; again, every court to have considered the issue has found that the police questioning of Grayson was proper and that Grayson's confessions were voluntary. What is more, Grayson "testified under oath in open court" that he participated in Mrs. Orr's murder. App. 41a (report and recommendation). Grayson has suggested that not even his in-court confession should count, because it might have been just an "internalized" recitation of his earlier confessions. Grayson C.A. Br. 43-46. But even setting aside the fact that there is no reason on this record to doubt Grayson's custodial confessions, Grayson did *not* just mechanistically regurgitate the same old story at trial. Instead, he fine-tuned his story on the stand, denying that he was able to remember some of the details to which he had earlier confessed. What didn't change, however, was Grayson's core admission that he had actively participated in Mrs. Orr's murder. And it is that confession of guilt that, to this day, "Grayson has never recanted." *Grayson*, 257 F.3d at 1201.

3. ***DNA testing could not, even if favorable, conclusively prove Grayson's innocence.*** Grayson repeatedly asserts in his petition that DNA testing could "conclusively prove" that he "is innocent of the crime for which he has been sentenced to die." Pet. at 12; *see also, e.g., id.* at 13 (testing could "conclusively prove" that Grayson "was not involved in the crime"); *id.* at 26 (testing "can prove whether he is innocent or guilty of the crime for which he was convicted"). That is just not true, for two reasons.

First, it is important to recognize (as the Eleventh Circuit did, *see* App. 9a) that Grayson was convicted and sentenced not for *rape*-murder but, instead, for *burglary*-murder – with robbery, not rape, serving as the predicate for the burglary. *See Grayson v. State*, 479 So. 2d 69, 71 (Ala. Crim. App. 1984) ("Darrell Grayson ... was indicted for the capital offense involving the nighttime burglary and intentional killing of Annie Laura Orr. Alabama Code Section 13A-5-31(a)(4) (1975). Both counts of the indictment charged Grayson with breaking and entering with the intent to commit robbery and intentional killing. A jury found Grayson 'guilty of the capital offense as charged in Count One and Two of the indictment.'"). The specific basis of Grayson's capital-murder conviction matters, of course, because he now seeks DNA testing – of semen stains on Mrs. Orr's nightgown and bed sheet (Pet. at 12) – to prove, in essence, that he is innocent of a crime (rape-murder) for which he was neither charged nor convicted. Accordingly, as the district court quite correctly observed, Grayson's argument "that the DNA testing would exonerate him is flawed because at best it could only prove that he did not rape the victim – not that he did not kill her as charged," *i.e.*, during the commission of a burglary. App. 32a.

Presumably recognizing that even a favorable test could not impugn his formal charge, conviction, or sentence itself, Grayson offers a second argument: that a favorable test might call into question the "theory" or "narrative" of the offense that the State offered at trial. Pet. at 12, 13, 14, 15. But even this fallback position misses the mark. To be sure,

it was the State's position at trial that the two men who had perpetrated the burglary-murder for which Grayson was indicted, tried, convicted, and sentenced had also raped her. But that is not an inescapable scientific fact. At most, a DNA test favorable to Grayson here would suggest that the State's theory of how the burglary-murder unfolded was off-base – that perhaps, for instance, as the Eleventh Circuit recognized, "a third man was involved and had raped Mrs. Orr." App. 20a. A favorable test "would not exclude Grayson's involvement in the capital murder, much less definitively show his innocence." *Id.*

Critiquing the State's trial theory and conclusively proving actual innocence, of course, are two entirely different things. Grayson seems to assume that it is sufficient, even at this late stage – *i.e.*, post-trial, post-appeal, post-post-conviction – that "it is possible to imagine a number of alternative theories of the crime against Mrs. Orr," one of which *might* leave him out of the mix. Pet. at 13. The Eleventh Circuit, Grayson says, "erred when it accepted the State's inculpatory alternative theory of the crime to the exclusion of [his own] exculpatory alternative theory of the crime." *Id.* He is wrong about that. If the notion of finality has any bite at all, it must be the case that Grayson cannot *now* – 26 years and at least 9 court reviews after the fact – win relief simply by attempting to poke holes in the prosecutor's narrative of the case and by theorizing a scenario in which he didn't kill Mrs. Orr. And, indeed, this Court's decisions in *Herrera v. Collins*, 506 U.S. 390 (1993), *Schlup v. Delo*, 513 U.S. 298 (1995), and *House v. Bell*, 126 S. Ct. 2064 (2006), establish that the threshold for making out a freestanding "actual innocence" claim – which is the only lens through which Grayson's current suit can be understood[7] – is "extraordinarily

---

[7] Grayson's DNA-based contention here cannot be understood as a prelude to a *Schlup/House*-like "gateway" claim for the simple reason that *there is nothing to which the "gateway" might lead.* There is no next step; this is the end of the road. Throughout the appellate and post-conviction processes, Grayson has presented claims assailing his trial as unfair. But those chal-

high." *Herrera*, 506 U.S. at 417. It is not enough for a convict in Grayson's shoes even to "cast considerable doubt on his guilt." *House*, 126 S. Ct. at 2087. Rather, he must make a "'truly persuasive demonstration'" of his actual, factual innocence. *Id.* at 2086 (quoting *Herrera*, 506 U.S. at 417).[8] He must, in short, actually prove his innocence, which is precisely what Grayson cannot do here.[9]

---

lenges have been uniformly - and finally - rejected. The fairness of Grayson's trial is no longer open to question.

[8] Grayson's repeated invocation of this Court's decision in *House* (Pet. at 2, 12, 14) is puzzling; comparisons between this case and that are decidedly unfavorable to him. First, *House* provides a glimpse of how Grayson might have litigated his DNA-request claim; unlike Grayson, who bypassed all post-conviction opportunities to request testing in favor of filing an eleventh-hour §1983 complaint, House pursued his DNA-based claim on federal habeas. Second, House presented a far more compelling claim than Grayson has here. In *House*, this Court faced an exclusionary DNA test result *combined with* (1) what the Court called "disarray" surrounding the State's handling of forensic evidence, complete with spillage, contamination, and exposure, and (2) "troubling evidence" that an identifiable third party (namely, the victim's husband) might well, in fact, have been the killer. 126 S. Ct. at 2083. Even on that record, this Court called it a "close" question whether House had made out a "gateway" claim under *Schlup*, *id.* at 2086, and, more importantly, *unanimously rejected* House's freestanding actual-innocence claim under *Herrera*, *see id.* at 2086-87. Here, of course, all we have is a naked (and tardy) request for DNA testing by a duly-convicted individual who does not even assert his own innocence, let alone someone else's guilt. Assuming, therefore, that Grayson's current request is indeed a prelude to a freestanding *Herrera*-based innocence claim, *see supra* note 7, *House* conclusively demonstrates that the claim (which, even assuming a favorable test result, would be demonstrably weaker than House's own) is doomed to failure.

[9] Grayson's citation to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Blakely v. Washington*, 542 U.S. 296 (2004), as evidence of the importance of "the role of the jury" (Pet. at 14) is doubly flawed. First, Grayson did not cite those cases or make any "role of the jury" argument in his briefs to the Eleventh Circuit. *See, e.g.*, Grayson C.A. Br. vi-vii (Table of Authorities). Second, none of those cases arises in the same procedural posture as Grayson's - namely, a convict's post-trial, post-appeal, post-post-conviction effort to *undo* a jury's verdict and, in effect, prove anew his actual innocence.

4. Grayson inexplicably waited until the eleventh hour to seek DNA testing. It is undisputed that Grayson waited 15 years - and until the proverbial eleventh hour - to seek DNA testing. Grayson has contended in his defense that "[a]t the time of [his] conviction" (in 1982) and the "appeal thereof" (1984-85), "DNA testing was not available, nor had the scientific process been developed." C.A. ER 1 Exh. F, p.1 (Grayson Aff.); *accord* Pet. at 26 (Grayson's "trial ended" "long before the advent of this revolutionary technology"). That may be so, but it is undeniable that by the time Grayson filed his first state post-conviction petition in 1986, DNA testing was being used in criminal cases. *See, e.g.*, U.S. Department of Justice, *Postconviction DNA Testing: Recommendations for Handling Requests* 1, 26, 27 (Sept. 1999) (dating use of DNA testing in criminal cases to 1985 or 1986). Indeed, Grayson's own DNA expert was employing a relatively advanced form of DNA-testing technology as early as 1986, *see* C.A. ER Exh. D, p.2 (Blake Aff.), and the Innocence Project, which is currently handling Grayson's case and which is devoted exclusively to DNA-based litigation, was established in 1992, *see* Innocence Project, About the Innocence Project, http://www.innocenceproject.org/about/ (Nov. 28, 2006)

Beginning in 1986, Grayson had post-conviction petitions pending in the state or federal courts for the better part of 15 years. *See supra* at 3-4. Throughout those post-conviction proceedings - in both state and federal court - Grayson was represented by Stephen Bright, one of the "foremost experts in capital defense work in the country." *Williams v. Head*, 185 F.3d 1223, 1228 & n.2 (11th Cir. 1999) (emphasizing Bright's considerable expertise). Nonetheless, as the Eleventh Circuit emphasized, despite the ready availability of DNA testing technology and the expertness of his counsel, Grayson *never* sought testing during the 15 years that his post-conviction challenges percolated. App. 10a-11a. Instead, as chronicled above (*see supra* at 3-5), Grayson waited to seek testing until September 23, 2002. Not only did Grayson wait until after his post-conviction challenges had run their course, but also - and more tellingly - he waited until

after the State, sensing some finality, had formally requested an execution date from the Alabama Supreme Court. *To this day, Grayson has offered no explanation whatsoever for his delay.*

The only explanation that suggests itself – particularly given Grayson's continuing failure to proclaim unambiguously his actual innocence – is that Grayson viewed a last-minute DNA request as a way to postpone his execution. If that was the strategy, it worked perfectly. As we have explained (*see supra* at 5), the Alabama Supreme Court – at Grayson's urging and over the State's objection – has refused to set an execution date "pending a ruling" in Grayson's DNA-based §1983 suit.[10]

B. Even Setting Aside The Peculiarities Of Grayson's Case, The Eleventh Circuit's Reasoning Is Sound And Its Decision Correct.

In his §1983 complaint, Grayson forwarded six separate claims: (1) "violation of due process of law"; (2) "actual innocence"; (3) "cruel and unusual punishment"; (4) "confrontation and compulsory process"; (5) "right of access to courts and equal protection of the laws"; and (6) "clemency." C.A. ER 1, p.11. By the time his case reached the Eleventh Circuit, Grayson had abandoned many of his initial claims and was focusing on the "due process" and "clemency" angles. With respect to the former, Grayson argued that he had a due process right to testing under (1) *Brady v. Maryland* and its progeny; (2) *Matthews v. Eldridge*'s three-part balancing test; (3) *Arizona v. Youngblood*; and (4) substantive due process principles. Grayson C.A. Br. 18-50. With respect to the latter, Grayson contended that without DNA testing he could not "effectively pursu[e] executive clemency." *Id.* at 51-55.

In his current petition, Grayson has dropped much of the argumentation he presented to the Eleventh Circuit. He no longer seeks to rely on *Youngblood* (*see supra* at 10) or –at

---

[10] On November 11, 2006, Grayson filed yet another §1983 action; the latest suit challenges the method by which Alabama administers lethal injection. *See Grayson v. Allen*, No. 2:06-cv-1032-MEF (M.D. Ala.).

least in so many words - substantive due process, nor does he persist in his clemency-based contention. In this Court, Grayson pursues only two theories to support his testing request: *Brady* (Pet. at 22-26) and *Matthews* (Pet. at 27-29). The Eleventh Circuit correctly rejected both.

1. Grayson Is Not Entitled To Testing Under *Brady v. Maryland*.

In *Brady*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Grayson would have this Court extend *Brady* doctrine in two significant ways. Neither extension is warranted.

a. Brady *is a "fair trial" right.* In rejecting Grayson's argument, the Eleventh Circuit here emphasized (citing this Court's decisions for support) that a prosecutor's *Brady* obligations, as such, "do not extend beyond a defendant's conviction." Pet. at 22. To be clear, the question here is not whether a pre-trial failure to disclose evidence covered by *Brady* can be *remedied* in post-conviction proceedings. Of course it can. But Grayson has made no argument that the State violated *Brady* by refusing to turn over exculpatory evidence that it knew about (but that Grayson didn't) pre-trial. Rather, the question here is whether *Brady* can be read to obligate the State to disclose potentially favorable evidence that only *arises* post-conviction. It cannot - and, indeed, the only case that Grayson cites to support his proposed extension of *Brady* obligations beyond a defendant's conviction actually defeats his argument.

Brady is triggered, this Court has observed, by "the discovery, after trial, of information favorable to the accused that had been known [*i.e.*, before or during trial] to the prosecution but unknown to the defense." *United States v. Bagley*, 473 U.S. 667, 678 (1985); *accord United States v. Agurs*, 427 U.S. 97, 103 (1976) (same). Accordingly, time and again - beginning in *Brady* itself and continuing on up to the present - the Court has reiterated that the right established in

Brady is a "fair trial" right. *E.g.*, *Brady*, 373 U.S. at 87 ("avoidance of an unfair trial"); *Agurs*, 427 U.S. at 99 ("fair trial"); *Bagley*, 473 U.S. at 675 ("fair trial"); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) ("fair trial"); *United States v. Ruiz*, 536 U.S. 622, 628 (2002) ("fair trial"). Indeed, the Court has emphasized the "critical point" that "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *Agurs*, 427 U.S. at 108; *accord Bagley*, 473 U.S. at 678 (same).

This Court's consistent emphasis on *Brady*'s "fair trial" trappings – and on the absolute necessity of establishing a trial's unfairness as a prerequisite to a *Brady* claim – is significant here for two reasons. First, the case law underscores that *Brady* obligations apply to evidence known to the State (but not to the defense) before and during trial, not to what Grayson has called "after-acquired" evidence. Grayson C.A. Br. 20. Second, Grayson does not – and cannot in this §1983 action[11] – contend that his trial was unfair in the due-process sense, either as a result of a true *Brady* violation or of anything else.

In the face of this mass of authority confirming *Brady*'s status as a fair-trial right, Grayson cites (Pet. at 24) *Imbler v. Pachtman*, 424 U.S. 409 (1976) to support his proposed extension of *Brady* principles to the post-conviction setting. But far from supporting Grayson's contention, *Imbler* fatally undermines it. In the course of a discussion about prosecutorial immunity under §1983, the *Imbler* Court referred to a prosecutor's duty "to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation." *Id.* at 427 n.25. In the key sentence, the Court then stated that "*[a]t trial*, this duty is enforced by the requirements of *due process*," while "*after a conviction* the prosecutor also is bound by the *ethics of his office* to inform the appropriate authority of after-acquired or other informa-

---

[11] *See supra* note 3 (discussing *Heck v. Humphrey*, 512 U.S. 477).

tion that casts doubt upon the correctness of the conviction." *Id.* (emphasis added). The message is clear: Post-conviction disclosures are governed *not* by "the requirements of due process" as articulated in *Brady* and its progeny but, rather, by non-constitutional ethical standards.

The State, of course, does not take its ethical obligations lightly. But Grayson brought suit under §1983, which by its own terms applies only to "deprivation[s] of any rights, privileges, or immunities secured *by the Constitution and laws*" of the United States. 42 U.S.C. §1983 (emphasis added). Section 1983 is a vehicle for the enforcement of distinctly federal rights, not local bar standards. *See, e.g., Knight v. Jacobson*, 300 F.3d 1272, 1276 (11th Cir. 2002) ("Section 1983 does not create a remedy for every wrong committed under the color of state law, but only for those that deprive a plaintiff of a federal right.").[12] Grayson has cited absolutely no support in this Court's jurisprudence for the proposition that *Brady*'s *constitutional* rule – *i.e.*, the disclosure obligation itself – extends beyond a defendant's conviction.

Grayson is left to rely on a few "federal district court decisions" suggesting *Brady* as a source for a right to post-conviction DNA testing. Pet. at 22-26. But Grayson's citations only underscore the fact that every *appellate court* to address the question presented here has expressly rejected the suggestion that there is a federal constitutional right –

---

[12] It is not at all clear, in any event, that the applicable rules of professional conduct would require a prosecutor to consent to the DNA testing that Grayson seeks. Neither Rule 3.8 of the Alabama Rules of Professional Conduct, *see* http://alabar.org/ogc/ropc/rule3-8.htm (Nov. 28, 2006), nor the ABA's *Standards of Criminal Justice Relating to the Prosecution Function*, *see* http://www.abanet.org/crimjust/standards/pfunc_blk.html (Nov. 28, 2006), requires – either expressly or by clear implication – post-conviction disclosure of potentially useful evidence. Notably, the latter clearly locates the prosecutor's disclosure obligations in the section titled "Investigation for Prosecution Decision." *See id.* §3-3.11. In any event, the point is that while the State could seek a bar opinion concerning post-conviction DNA testing, no answer it received, however definitive, could ever support a §1983 action to compel that testing.

under *Brady* or elsewhere - to post-conviction testing. Until some federal appellate court or state supreme court agrees with Grayson, there is no basis for certiorari.

b. Brady *applies to evidence that is actually, not just potentially, favorable.* Grayson's theory here requires a second fundamental extension of *Brady* doctrine to include evidence that may - but may not - prove favorable or exculpatory. *See, e.g.*, Pet. at i, 8, 10, 11, 20, 27, 28 ("potentially exculpatory biological evidence"). There is no support for that extension. By its own terms, Brady applies only to "evidence favorable to an accused" - not *potentially* favorable, but *actually* favorable. 373 U.S. at 87. Judge King put the point simply in *Harvey v. Horan*:

> [U]nder the second prong of the *Brady* rule, the prosecution is only required to disclose evidence that is favorable to the defendant. *Brady*, 373 U.S. at 87, 83 S. Ct. 1194. It is not now known whether the biological evidence being sought by Harvey would be favorable or unfavorable to him. As such, even if Harvey had been denied access to the evidence during his trial, the *Brady* rule would not have applied.

278 F.3d at 385 n.6 (King, J., concurring).

This Court has repeatedly and unambiguously confirmed that *Brady* embodies an *actual*-favorableness requirement. *See, e.g., Agurs*, 427 U.S. at 99, 106, 107, 111 (evidence must be "exculpatory"); *Bagley*, 473 U.S. at 674, 675, 678, 680, 682 (evidence must be "favorable to the accused"); *id.* at 676 ("exculpatory"); *Kyles*, 514 U.S. at 421, 432, 433, 435, 437, 438, 439, 451, 453 ("favorable"); *id.* at 433 ("exculpatory"). Further, this Court's decisions make clear that the "potentiality" gloss that Grayson seeks to graft onto *Brady*'s favorableness requirement (such that *Brady* would be triggered by "potentially favorable" evidence) applies instead to *Brady*'s separate materiality requirement: "[T]he constitutional duty [to disclose] is triggered by the potential impact of favorable but undisclosed evidence." *Kyles*, 514 U.S. at 434. That is, *Brady* "requires disclosure only of evidence that

is both favorable to the accused and 'material to either guilt or punishment'" - where "material" means that there is a "reasonable probability" that, had the evidence been disclosed, "the result of the proceeding would have been different." *Bagley*, 473 U.S. at 674, 682. In other words, *Brady* evidence must be (1) *actually* favorable and, in addition, (2) "reasonabl[y] probabl[y]" - *i.e.*, *potentially* - outcome determinative. A request for DNA testing, the result of which is of course unknown, does not qualify.

2. Grayson Is Not Entitled To Testing Under *Matthews v. Eldridge*.

Grayson also asserts that he has a procedural due process right to testing and that the Eleventh Circuit's three-part *Matthews v. Eldridge* analysis was "incorrect." Pet. at 27. He asks, in effect, for this Court to engage in a fact-intensive rebalancing of the scales. There is, with respect, nothing certworthy about Grayson's *Matthews* argument.

The only one of this Court's procedural-due-process cases that involves an individual in Grayson's shoes - a duly convicted and death-sentenced inmate - is *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998). In that case, a condemned prisoner who had exhausted his appeals filed a §1983 action challenging the procedures employed in connection with his state clemency investigation; he contended, for instance, that he had received insufficient notice of his clemency hearing and that his lawyer had been improperly excluded from participation in the process.

Four justices in *Woodard* concluded that a duly convicted and death-sentenced inmate has no continuing "life interest" that could support a procedural-due-process challenge to clemency procedures. *See id.* at 279-82 (Rehnquist, C.J., joined by Scalia, Kennedy, and Thomas, JJ.). Four concurring justices believed, however, that "[a] prisoner under a death sentence remains a living person and consequently has an interest in his life," *id.* at 288 (O'Connor, J., joined by Souter, Ginsburg, and Breyer, JJ., concurring in the judgment), and Justice Stevens, who dissented, added a fifth vote

for the latter view, *see id.* at 291 (Stevens, J., dissenting in part). Critically, however, the concurring justices concluded that a condemned inmate's continuing life interest, though existent, was so attenuated as to trigger only the most "*minimal* procedural safeguards." *Id.* at 289 (emphasis in original). Indeed, they ventured only that "[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency ...." *Id.*

Accordingly, even assuming - as the Eleventh Circuit here did (App. 24a) - that procedural-due-process principles apply to Grayson's claim, unless the State's decision not to conduct DNA testing here is tantamount to a coin-flip, his argument must fail. Plainly, the State's actions here are not arbitrary or irrational in the coin-flip sense, as a review of the second and third *Matthews* factors indicates. With respect to the second factor, the Eleventh Circuit was correct to conclude, particularly given the specifics of Grayson's case, that "the risk of an erroneous deprivation of Grayson's alleged liberty interest is low, and the probable value of Grayson's post-conviction access to evidence is slight." App. 25a. In his petition, Grayson studiously ignores the circumstances of his own case in favor of a reliance on 187 *other* individuals whom, he says, were exonerated by DNA testing. Pet. at 16-19, 28. Grayson's attempt to focus the Court's attention elsewhere is understandable. Recall that Grayson himself (1) repeatedly confessed to killing Mrs. Orr, both to the police and again in open court; (2) to this day has never recanted those confessions or so much as asserted his actual innocence; (3) faces overwhelming evidence of guilt; (4) requests testing that, even if favorable, cannot definitively prove his innocence; and (5) inexplicably never, during the 15 years his case was pending in post-conviction proceedings, sought the testing he now seeks at the eleventh hour. *See supra* at 12-21. Grayson's claim here, in essence, is that *every* condemned inmate, no matter how flimsy his case, has an "absolute" procedural-due-process right to post-

conviction DNA testing. Pet. at 28. That is not, and should not be, the law.

With respect to the third *Matthews* factor, the Eleventh Circuit correctly held that the State has a keen interest in preventing a flood of post-conviction DNA-testing requests - or requests for re-examination based on whatever other kind of technology may evolve down the road - and in protecting the finality of duly-adjudicated criminal convictions and sentences. Grayson asserts that the floodgates problem isn't real, and cites as support his assertion that since the Eleventh Circuit "held that cases like this one could proceed under §1983," there "has been no flood of §1983 plaintiffs pressing similar claims." Pet. at 29. But that argument misses the point. Holding, on the one hand, that a legal claim may be pursued and, on the other, that the claim has substantive merit are two entirely different things. Were a court to give credence to Grayson's novel due-process theory requiring post-conviction DNA testing, there can be little doubt that the requests would rush in.

The State's interest in finality, of course, is undeniable. *See, e.g., Calderon v. Thompson*, 523 U.S. 538, 555 (1998); *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992); *Murray v. Carrier*, 477 U.S. 478, 487 (1986). Grayson has contended in this litigation that post-conviction DNA testing does not "trespass[] on any interests that support the finality of judgments" and, more particularly, that "*[t]esting has no impact whatsoever on victims, witnesses or complainants, unless it actually exonerates an innocent individual.*" Grayson C.A. Br. 36-37 (Grayson's emphasis). Grayson's position in that respect is, frankly, so detached from reality as to be unbelievable. "Finality" is not some free-floating, abstract ideal. It serves fundamental public policies, not the least of which, as this Court has emphasized, is ensuring that crime victims and their survivors get the closure and sense of repose to which they are entitled. *See Calderon*, 523 U.S. at 556 ("Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out.").

Given these weighty concerns, it is hardly arbitrary or irrational for the State to decline at this late date to reopen Grayson's case for the purpose of DNA testing - particularly given, again, that Grayson to this day has never asserted his actual innocence, that the record evidence of his guilt is overwhelming, that the testing sought could not definitively prove his innocence, in any event, and that he inexplicably waited until the eleventh hour to seek testing.

III. This Court Should Deny Certiorari Because Post-Conviction DNA Testing Is An Issue Uniquely Suited To Legislative Resolution.

Given the difficulties inherent in defining and administering a "right" to post-conviction DNA testing - Who could assert the right? Must a petitioner have steadfastly maintained his innocence? What sort of threshold showing is required? What sort of relief should follow a favorable result? - this is an issue that is uniquely suited to *legislative* resolution. As this Court has emphasized, it is often "easier to devise a [right] by statute than to derive [it] through the Constitution, simply because the statute can let the [right's operation] turn on any sort of practical consideration without having to subsume it under a broader principle." *Atwater v. City of Lago Vista*, 532 U.S. 318, 352 (2001). And, of course, as Judge Wilkinson has stressed, post-conviction DNA testing "is not an area in which legislative bodies have gone into permanent recess." *Harvey v. Horan*, 285 F.3d 298, 301-02 (4th Cir. 2002) (Wilkinson, C.J., concurring in the denial of rehearing en banc). Quite the contrary, legislatures around the country are presently grappling with this very issue, and, as Grayson himself observes in his petition, "the overwhelming majority of states have passed statutory mechanisms to allow convicted defendants to seek such testing." Pet. at 20.

Grayson's assertion that Alabama, specifically, "has tragically failed" to address the issue of DNA testing legislatively (Pet. at 20) is both irrelevant and misleading. It is irrelevant because the federal courts do not exist simply to

supply outcomes that the democratic process rejects. And it is misleading because it suggests that the Alabama Legislature has finally and definitively refused to create a statutory right to DNA testing. That is incorrect; the situation in Alabama is more fluid than Grayson is willing to admit. A bill that would provide for post-conviction testing in certain circumstances, Senate Bill No. 28, was unanimously voted out of committee in February 2006. The bill, however, was not put to a floor vote during the legislative session and is presently listed as having been "indefinitely postponed." Alabama Legislative Information System Online, Bill Status for SB28, http://alisdb.legislature.state.al.us.acas/ACASLogin/asp (Nov. 28, 2006).[13] So, to be sure, Alabama has not yet created a statutory mechanism for obtaining post-conviction DNA testing. The point, though, is that the democratic dialogue concerning that very issue is ongoing.

Grayson apparently believes that the current legislative ferment provides a reason for this Court's intervention. But just the opposite is true. "[T]he States are currently engaged in serious, thoughtful examinations" of the post-conviction DNA testing issue. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). This Court should not "short-circuit legislative activity," *Harvey*, 278 F.3d at 376-77, through "the conversation-stopping process of constitutionalization," *Harvey*, 285 F.3d at 301 (Wilkinson, C.J.). Put simply, democracy appears to be working, and the Court should let it work.

CONCLUSION

For the foregoing reasons, the Court should deny Grayson's petition for certiorari.

---

[13] Grayson would not qualify under SB 28. As drafted, the bill requires, as prerequisites to relief, (1) "[a]n assertion of actual innocence of the offense for which an applicant was convicted, under penalty of perjury"; and (2) "[p]rima facie evidence demonstrating that the identity of the perpetrator was at issue in the trial that resulted in the conviction of the applicant." SB 28, p.3. Neither condition is satisfied here.

Respectfully submitted,

Troy King
Attorney General

Kevin C. Newsom
Solicitor General
Counsel of Record*

J. Clayton Crenshaw
Assistant Attorney General

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401

December 1, 2006

(1)

No. 06-709

FILED
DEC 2 2 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DARRELL GRAYSON,

Petitioner,

—v.—

TROY KING, Attorney General for the State of Alabama, in his official capacity; ROBERT E. OWENS, JR., District Attorney for Shelby County, in his official capacity; SHELBY COUNTY DISTRICT ATTORNEY'S OFFICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
COA DKT. NO. 05-15725p

REPLY BRIEF FOR THE PETITIONER

PETER J. NEUFELD
VANESSA POTKIN
COLIN STARGER
INNOCENCE PROJECT
100 Fifth Avenue
New York, New York 10011
(212) 364-5340

DAVID BOIES
(*Counsel of Record*)
CHRISTOPHER M. GREEN
BRIAN T. KOHN
IAN M. DUMAIN
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
(914) 749-8200

Attorneys for Petitioner

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR THE PETITIONER 1

I. The Important National Question of Whether There Is a Post-Conviction Right of Access to Potentially Exculpatory Biological Evidence For the Purpose of STR DNA Testing Is Squarely Before This Court Because Alabama Has Not Enacted a Post-Conviction DNA Testing Statute..... 1

1. The Alabama Legislature has not enacted a DNA testing statute..... 1

2. The right Mr. Grayson asserts is narrow, limited and manageable 2

3. The question raised by this case is one of national importance 2

4. The courts of appeals have not spoken with a unified voice on the question presented..... 3

5. Mr. Grayson has a constitutional right of access to the potentially exculpatory biological evidence that was used against him at trial for the purpose of STR DNA testing..... 5

PAGE

II. Mr. Grayson Has a Right of Access to the Potentially Exculpatory Biological Evidence That Was Used Against Him at Trial for the Purpose of STR DNA Testing Under the Facts of His Case 7

1. Mr. Grayson has no recollection of the crime 7

2. STR DNA testing can establish that Mr. Grayson is innocent of the crime for which he was sentenced to die 8

3. The evidence of Mr. Grayson's guilt does not foreclose relief 9

4. Mr. Grayson's request for DNA testing is timely 9

III. CONCLUSION 10

TABLE OF AUTHORITIES

Cases: PAGE

Ake v. Oklahoma, 470 U.S. 68, 83 (1985) 2

Alley v. Key, 2006 WL 1313354 (6th Cir. 2006) . 4, 5

Arizona v. Youngblood, 488 U.S. 51 (1988) 5, 6, 7

Brady v. Maryland, 373 U.S. 83 (1963) 6

Bridgers v. Texas, 532 U.S. 1034 (2001) 5

Harvey v. Horan, 278 F.3d 370 (4th Cir. 2002) .. 3, 4

Harvey v. Horan (Harvey II), 285 F.3d 298 (4th Cir. 2002) 4

Heck v. Humphrey, 512 U.S. 477 (1994) 4

Herrera v. Collins, 506 U.S. 390 (1993) 8, 9

Hill v. McDonough, 126 S.Ct. 2096 (2005) 4

Nelson v. Campbell, 541 U.S. 637 (2004) 4

Osborne v. District Attorney's Office for Third Judicial Dist., 423 F.3d 1050 (9th Cir. 2005) 4

Osborne v. District Attorney's Office for Third Judicial Dist., 445 F.Supp.2d 1079 (D. Alaska 2006) 5

Savory v. Lyons, ___ F.3d ___, 2006 WL 3423072 (7th Cir. 2006) 3, 4

Yarris v. County of Delaware, 465 F.3d 129 (3d Cir. 2006) 6, 7

Rules:

Sup. Ct. R. 10 ..... 2, 3

REPLY BRIEF FOR THE PETITIONER

I. The Important National Question of Whether There Is a Post-Conviction Right of Access to Potentially Exculpatory Biological Evidence For the Purpose of STR DNA Testing Is Squarely Before This Court Because Alabama Has Not Enacted a Post-Conviction DNA Testing Statute.

Darrell Grayson sits on Alabama's death row awaiting execution. STR DNA testing could prove that Mr. Grayson is innocent, as such testing has already done for fourteen other men who had been wrongly convicted and sentenced to die. Unlike the vast majority of other states, Alabama has no post-conviction DNA testing statute. Against this life-and-death backdrop, the State urges that this Court not " 'short-circuit legislative activity' through 'the conversation-stopping process of consitutionalization" because the "democratic dialogue" concerning post-conviction DNA testing is ongoing in Alabama. BIO at 30 (internal citations omitted). "Put simply," the State concludes, "democracy appears to be working, and the Court should let it work." *Id.* This argument is pure folly because there is no indication that Alabama will enact a post-conviction DNA testing law before it executes Mr. Grayson. In reality, only this Court can protect Mr. Grayson's constitutional right of access to the potentially exculpatory biological evidence that was used against him at trial for the purpose of STR DNA testing—at his own expense—that could literally save his life. Certiorari is appropriate.

1. *The Alabama Legislature has not enacted a DNA testing statute.* While the State maintains in its Brief in Opposition ("Opposition") that Mr. Grayson's position that the Alabama Legislature has failed to address the issue of DNA testing "is both irrelevant and misleading," BIO at 29-30, it also admits that that the only DNA bill to get out of committee was not put to a floor vote and has been "indefinitely

postponed." *Id.* The failed efforts of a few Alabama state senators to let Alabama join the vast majority of other states in providing access to biological evidence for the purpose of DNA testing does not weigh against recognizing Mr. Grayson's right of access. Indeed, Alabama's continuing failure to enact *any* statute in the face of the legislative successes in its sister states cuts in favor of Mr. Grayson. *See Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (observing that more than forty states and the federal government already provide indigent defendants with access to psychiatric assistance through legislation or judicial decisions and then holding that the Constitution provides such a right). Despite the State's empty claim that the "democratic dialogue is ongoing," it is likely that if this Court denies certiorari, Mr. Grayson will be executed while awaiting action by the Alabama Legislature.

2. *The right Mr. Grayson asserts is narrow, limited and manageable.* The State asserts that administering a post-conviction right of access would be difficult. BIO at 29. However, the right Mr. Grayson asserts is narrow, limited and manageable. Specifically, Mr. Grayson—a death row inmate—asserts a right of access to the potentially exculpatory biological evidence that the State used against him at trial—which has never before been subjected to DNA testing—for the purpose of DNA testing for which he will pay. A decision in Mr. Grayson's favor would not create an unwieldy universal right to post-conviction DNA testing, but would be limited to the facts present in this case.

3. *The question raised by this case is one of national importance.* Instead of engaging Mr. Grayson on the question of whether his petition presents a question of national importance, the State mischaracterizes Mr. Grayson's argument by recasting it as one concerning a circuit split. Citing only to Supreme Court Rule 10 (a-b) the State argues that certiorari should not be granted in this case because there is no circuit split, which it characterizes as the "chief

reason for granting certiorari." BIO at 9. But Rule 10 does not limit certiorari to resolving conflicts in the circuits or even hold conflicts out for special consideration; indeed, it expressly contemplates review of important national questions. *See* Sup. Ct. R. 10(c).

The courts of appeals that have addressed the question of whether there is a post-conviction right of access to potentially exculpatory biological evidence for the purpose of STR DNA testing agree that it is an important one. *See Savory v. Lyons*, _ F.3d _, 2006 WL 3423072 (7th Cir. 2006) ("Substantive due process or a right to prove actual innocence might also support a post-conviction right of access to physical evidence. But as Savory's claims are not timely we need not reach that determination, as important as it is.") (internal citations omitted); App. 27a ("Our decision here in no way demeans the value of DNA testing or suggests that it should not be made available post-conviction."); *Harvey v. Horan*, 278 F.3d 370, 388 n.7 (4th Cir. 2002) (King, J., concurring) ("[I]t may be that the significant interest of our constitutional system in ensuring justice requires, under the Due Process Clause, that prisoners enjoy access to evidence for the purpose of DNA testing. That, however, in my view, is not an issue within our bailiwick; if any such right exists, it must be recognized by judges of a higher pay grade than those of this Court."). In light of the fact that Mr. Grayson's life hangs in the balance, it is hard to understand the State's position that "there simply is no exigency requiring this Court's review." BIO at 12.

4. *The courts of appeals have not spoken with a unified voice on the question presented.* Despite the State's assertions otherwise, BIO at 9-12, there is no agreement among the courts of appeals on this question; indeed, the decision below is the only published court of appeals decision disposing of a case based on the question presented here.

The State inaccurately characterizes the holding of *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002), as consistent with the Eleventh Circuit's decision below. In fact, the Fourth Circuit held that Harvey's claim was barred under the doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994). *Harvey*, 278 F.3d at 378. In light of recent decisions of this Court, the Harvey holding in no longer tenable. *See Nelson v. Campbell*, 541 U.S. 637 (2004); *Hill v. McDonough*, 126 S.Ct. 2096 (2005). Indeed, all circuit courts that have considered the *Heck* question since *Nelson* have held that post-conviction DNA actions are properly brought under Section 1983. *See, e.g., Savory*, _ F.3d _, 2006 WL 3423072 (7th Cir. 2006), *Osborne v. District Attorney's Office for Third Judicial Dist.*, 423 F.3d 1050 (9th Cir. 2005). The language in *Harvey* on which the state so heavily relies is mere *dicta* in an otherwise discredited opinion.

Moreover, *Harvey* was later rendered moot when Virginia passed a post-conviction DNA testing statute. *See Harvey v. Horan (Harvey II)*, 285 F.3d 298 (4th Cir. 2002) (Wilkinson, C.J., respecting the denial of a rehearing en banc) ("The question before us is not whether Harvey should or will receive the DNA evidence. He should and he will."). Unlike Mr. Grayson, Harvey obtained DNA testing because of the passage of a state law. In *Harvey II*, Judge Luttig seized the opportunity to write a lengthy and well-reasoned opinion in support of a right of access to potentially exculpatory biological evidence. *Id.* at 317 (Luttig, J., respecting the denial of a rehearing en banc). Taken together, the extensive *Harvey* opinions underscore the importance of the question presented by this case and put the lie to the notion that the federal appellate bench is of a single mind on it.

Respondent also cites the Sixth Circuit's unpublished opinion in *Alley v. Key*, 2006 WL 1313354 (6th Cir. 2006). BIO at 10-11. The State fails to mention, though, that the Sixth Circuit expressly qualified its holding by stating that

"this case and its expedited briefing schedule do not encourage a definitive ruling on all aspects of the matter . . . ." *Compare Osborne v. District Attorney's Office for Third Judicial Dist.*, 445 F.Supp.2d 1079 (D. Alaska 2006) (holding that there is a limited right to post-conviction STR DNA testing and noting that the issue was "well-briefed" by both parties). Moreover, this Court's denial of certiorari in *Alley* is of little consequence. *See Bridgers v. Texas*, 532 U.S. 1034, 1034 (2001) (Breyer, J., respecting the denial of the petition for a writ of certiorari) ("Because this Court may deny certiorari for many reasons, our denial expresses no view about the merits of petitioner's claim."). Indeed, even in *Alley*'s wake, the court below left open the possibility that some plaintiffs may successfully assert a right of access to biological evidence for post-conviction DNA testing. App. 26a.

5. *Mr. Grayson has a constitutional right of access to the potentially exculpatory biological evidence that was used against him at trial for the purpose of STR DNA testing.* For the reasons set forth in the Petition, the decision of the court below is wrong and contrary to this Court's precedents. While the parties' positions on this issue are clearly set forth in the Petition and Opposition, the State makes one new assertion that requires a response. Specifically, the State asserts that Mr. Grayson has abandoned his reliance on *Arizona v. Youngblood*, 488 U.S. 51 (1988). BIO at 10. He has not.

In *Youngblood*, this Court recognized the State's obligation to preserve evidence in "that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Youngblood*, 488 U.S. at 58. Doctrinally, *Youngblood* concerned "what might loosely be called the area of constitutionally guaranteed access to evidence," *Id.*

at 51 (internal citation omitted) which derives from *Brady v. Maryland*, 373 U.S. 83 (1963). Accordingly, Mr. Grayson's reliance on *Youngblood* below and in this Petition fleshes out the contours of his *Brady*-derived right. *See* Grayson Brief at 9-23 (including *Youngblood* analysis as component of *Brady* argument); Grayson Reply Brief at 9-17 (same).

Youngblood specifically rebuts the State's claim that this Court's precedents only guarantee a defendant's right to "actually, not just potentially, favorable" evidence. BIO at 25. *Younglood* makes clear that "potentially exculpatory evidence" is constitutionally protected and that to destroy such evidence in bad faith violates due process. Moreover, *Youngblood* answers the State's claim that *Brady* is strictly a "fair trial" right that has no post-conviction application. BIO at 22-23. Indeed, the Third Circuit recently applied *Youngblood* in a § 1983 damages action brought by an individual whose conviction and death sentence were earlier vacated and who had alleged that county prosecutors wrongfully withheld biological evidence that could be used for DNA testing after his conviction and sentencing. *See Yarris v. County of Delaware*, 465 F.3d 129, 142 (3d Cir. 2006). There, the Third Circuit explained:

> At the outset, we note that *Youngblood* addresses law enforcement officials' constitutional duty to preserve evidence *prior* to conviction, whereas Yarris's claim is based on the CID Detectives' post-conviction conduct. We nonetheless believe that the Supreme Court's application of the Due Process Clause in *Youngblood* guides our analysis here. However, the *Youngblood* decision did not indicate that it was limited to its temporal context, as it sought to govern applicability of the Due Process Clause in "what might loosely be called the area of constitutionally guaranteed access to evidence" and resolve the violation it described

broadly as "the failure of the State to preserve evidentiary material."

Id. As Mr. Grayson argued below, under *Youngblood*, the protection of potentially exculpatory evidence under the due process clause extends to the post-conviction context.

II. Mr. Grayson Has a Right of Access to the Potentially Exculpatory Biological Evidence That Was Used Against Him at Trial for the Purpose of STR DNA Testing Under the Facts of His Case.

As the Eleventh Circuit recognized, this case presents the question of "whether a defendant has a federal constitutional right to post-conviction access to biological evidence for DNA testing." App. 14a. The State restates the question presented in a manner that seeks to divert attention from the central legal issue by reference to legally irrelevant assertions. This Court should not be distracted by the State's attempt at misdirection. Implicitly, the State suggests that this Court need not consider whether Mr. Grayson is entitled to access the potentially exculpatory biological evidence used against him at his trial because it appears to the State to be very unlikely that such testing would prove Mr. Grayson's innocence. Under the State's logic, this Court should delay its consideration of this important issue until it is raised by a petitioner who can conclusively demonstrate that he is innocent without DNA testing. That logic is self-evidently absurd, and it should be rejected.

1. *Mr. Grayson has no recollection of the crime.* The State is correct that Mr. Grayson has never asserted his actual innocence, but that is only part of the story. Since his trial, Mr. Grayson has consistently maintained that he was too intoxicated on the night of the murder to remember what occurred. Mr. Grayson's absolute and long-standing inability to recall the events in question has made it impossible for him to honestly assert his actual innocence; he simply does not know what happened. To predicate Mr. Grayson's

right of access to the potentially exculpatory biological evidence used against him at trial for the purpose of STR DNA testing because he cannot disclaim involvement in the crime would place him in an untenable Catch-22: to secure access to the evidence, Mr. Grayson would need to have "steadfastly" maintained his innocence; yet Mr. Grayson's ability to claim innocence is contingent on exculpatory DNA test results.

2. *STR DNA testing can establish that Mr. Grayson is innocent of the crime for which he was sentenced to die.* In his petition, Mr. Grayson explains in great detail the way in which STR DNA testing can establish that he is innocent of the crime for which he was convicted and has been sentenced to die. Pet. 12-15. Indeed, in order to counter the State's steadfast refusal to acknowledge that STR DNA testing is indeed capable of exonerating him, Mr. Grayson provided this Court with examples of cases analogous to his case in critical respects in which individuals have been exonerated by STR DNA testing. *Id.* at 15-19.

The State argues that even an STR DNA test that excludes Mr. Grayson as the source of the semen stains on the victim's nightgown and bedsheet could not prove that he is innocent of the crime for which he was convicted because Mr. Grayson was convicted of burglary-murder and not rape-murder. BIO at 17. The State's rigid analysis is intentionally blind to the realities of modern STR DNA testing. Indeed, in the Petition, Mr. Grayson provided two examples of cases in which STR DNA testing led to a CODIS hit and the apprehension of the real perpetrator. Pet. 17-19. The same result is possible here.

Instead of acknowledging that STR DNA testing can exclude Mr. Grayson as the source of the crime scene evidence in this case and lead to the real perpetrator, the State nakedly asserts that Mr. Grayson will never—no matter where STR DNA testing leads—be able to make the truly

persuasive showing of actual innocence required under *Herrera v. Collins*, 506 U.S. 390 (1993) to state a constitutional claim. BIO at 19. But Mr. Grayson need not make a truly persuasive showing of actual innocence at this stage. And experience shows that it would be foolish to assume what Mr. Grayson will or will not be able to prove after STR DNA testing is performed on the evidence in his case.

3. *The evidence of Mr. Grayson's guilt does not foreclose relief.* The State asserts that, independent of the biological evidence at issue here, there is "overwhelming" evidence of Mr. Grayson's guilt. BIO at 13-16. That evidence, while significant, is beside the point. It is beyond dispute that in each of the 187 DNA exonerations to date a jury found an innocent defendant guilty *beyond a reasonable doubt*. In many of these cases, the evidence against the defendant appeared as or more overwhelming than it appears in this case.

4. *Mr. Grayson's request for DNA testing is timely*. Finally, the State complains that Mr. Grayson waited until "the eleventh hour" to seek DNA testing "as a way to postpone his execution" and that he has "offered no explanation whatsoever for his delay." BIO at 20-21. The State, however, fails to explain how the timing of Mr. Grayson's request is at all relevant to his assertion of a constitutional right of post-conviction access to the biological evidence used against him at trial. Moreover, the State fails to acknowledge that individuals who languished in prison for years without asserting their innocence have been exonerated by DNA testing.

Ultimately, what matters for present purposes is that Mr. Grayson's § 1983 action is not time-barred. In its motion to dismiss, the State argued that this action is barred by the statute of limitations. The magistrate expressly declined to address the issue, the District Court did not mention it in its memorandum opinion, and the State did not raise the issue on appeal. App. 46a; App. 30a-32a. In any event, the State

could end the delay of which it complains at any time by consenting to the testing that Mr. Grayson seeks. Nevertheless, despite Mr. Grayson's repeated offers to pay for the testing and the fact that results would be available within a month, the State has repeatedly refused to consent. The delay associated with the pendency of this action is wholly chargeable to the State.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, certiorari should be granted.

December 22, 2006

Respectfully submitted,

DAVID BOIES
Counsel of Record
CHRISTOPHER M. GREEN
BRIAN T. KOHN
IAN M. DUMAIN
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200

PETER NEUFELD
VANESSA POTKIN
COLIN STARGER
INNOCENCE PROJECT
100 Fifth Avenue
New York, NY 10011
(212) 364-5340